Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services By Requiring BellSouth to Provide Wholesale or Retail Broadband Services to CLEC UNE Voice Customers	))))))))	WC Docket No. 03-251

COMMENTS OF CINERGY COMMUNICATIONS IN OPPOSITION TO EMERGENCY REQUEST FOR DECLARATORY RULING

and

REQUEST FOR DECLARATORY RULING AND PENALTIES TO BE PAID DIRECTLY TO CINERGY COMMUNICATIONS

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January 30, 2004

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In the Matter of	)	
BellSouth Telecommunications, Inc.	)	
Request for Declaratory Ruling that State	)	
Commissions May Not Regulate Broadband	)	WC Docket No. 03-251
Internet Access Services By Requiring	)	
BellSouth to Provide Wholesale or Retail	)	
Broadband Services to CLEC UNE Voice	)	
Customers	)	

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I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") filed its Emergency Request for Declaratory Ruling in an attempt to circumvent the decisions of state commissions addressing the anticompetitive nature in which BellSouth conducts itself with regard to DSL. Cinergy Communications Company[1] ("CCC") is the subject CLEC in the Kentucky decision referred to in BellSouth's Emergency Request.[2] CCC believes that its decision is factually unique, and must be considered separately from other state commission decisions. CCC hereby files its comments in opposition to BellSouth's Emergency Request as it relates to CCC and the Commonwealth of Kentucky. CCC makes no comment regarding the business plans or relief requested by any other CLEC, nor the decision of any state commission other than Kentucky.

CCC further urges the FCC to enforce its rules and BellSouth's own FCC Access Tariff to compel BellSouth to comply with its common carrier obligations and provide to CCC DSL transport on a region-wide basis "upon reasonable request, on just, reasonable, and nondiscriminatory terms; and in accordance with all applicable tariffing requirements."[3] "One of the fundamental goals of the Telecommunications Act of 1996 is to promote innovation and investment by all participants in the telecommunications

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[1] Cinergy Communications is a wholly-owned subsidiary of Q-Comm Corporation. Although Cinergy Corp. has licensed the use of its name to Q-Comm, it has no management oversight, control, or responsibility for Cinergy Communications.

[2] Since the time of Bellsouth's filing, the Kentucky PSC's Orders were upheld on appeal by the U.S. District Court for the Eastern District of Kentucky. BellSouth Telecommunications, Inc. v. Cinergy Communications Company, Civil Action No. 03-23-JMH, U.S. District Court Eastern District of Kentucky, *Memorandum Opinion and Order*, decided December 29, 2003. Attached hereto as Exhibit "A."

[3] *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 99-330, CC Docket No. 98-147, Second Report and Order, Released November 9, 1999 at ¶ 21. Attached hereto as Exhibit "B."

marketplace, in order to stimulate competition for all services, including advanced service."[4]

BellSouth is violating its own tariff and federal policy by refusing to provide nondiscriminatory DSL access to CCC on a region-wide basis. The FCC must review BellSouth's practices to insure that the FCC's above-quoted "fundamental goal" is being achieved in the market for bundled POTS and data services, as well as the market for advanced services such as CCC's SuperLink VBX™[5] product which requires broadband access to reach end user .

BellSouth's anticompetitive tactics have been very successful. Telephony Online reports in its January 22, 2004 article BellSouth posts 37% profit increase in Q4 that "Despite the continued drain from line losses, BellSouth today posted a **37% increase in 4th quarter profits off of revenues from bundling, long distance and DSL sales**. . . ."[6] CCC is entitled to compete with BellSouth in this lucrative market for bundled services with a combination of unbundled services obtained via an interconnection agreement and a DSL transport purchased out of a tariff. CCC should not have to continuously litigate these issues to get relief to which it is entitled under tariff and the filed rate doctrine. The FCC can avoid legal and administrative costs for the parties, the various state

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[4] *In the Matters of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, FCC 99-330, CC Docket No. 98-147, Second Report and Order, Released November 9, 1999 at ¶ 1. Attached hereto as Exhibit "B."

[5] Cinergy Communications' SuperLink VBX™ is a hosted PBX product which utilizes IP packet switching technology and requires broadband customer access. SuperLink VBX™ can provide the small business, home office or residential customer 4 VGEs (Voice Grade Equivalents) for full-featured local service, plus long distance, voice mail, find me-follow me messaging services, and high speed internet access over ADSL. Cinergy Communications can reach its enterprise customers (i.e. 10 VGEs and above) via UNE DS1 access. To the extent the FCC does not grant the relief requested, there will be no ability for Cinergy Communications to provide this service to the 4 VGE and under market.

[6] "BellSouth posts 37% profit increase in Q4" by Kevin Fitchard Telephony Online.com, January 22, 2004. (Emphasis Added) Attached hereto as Exhibit "C."

commissions and the Federal Courts by providing the region-wide relief requested by CCC herein.

I. COMMENTS OF CINERGY COMMUNICATIONS IN OPPOSITION TO BELLSOUTH'S EMERGENCY REQUEST.

A. Procedural Background of the Kentucky Ruling

CCC filed a Petition for Arbitration with the Kentucky PSC pursuant to Section 252 of the Telecommunications Act of 1996 (the "Act") in December of 2001. Among the issues to be decided was whether BellSouth would be required to provide its federally tariffed DSL product[7] over UNE loops purchased out of the interconnection agreement. CCC framed this issue as one involving line-splitting. CCC believed it was entitled to this relief because the Kentucky PSC had earlier determined that "BellSouth may not discontinue the provision of line-splitting when a CLEC provides voice service through UNE-P, **regardless of which xDSL provider is used.**"[8] In Kentucky, there are no providers of DSL with which CCC can partner other than BellSouth. Therefore, CCC sought to line-split with BellSouth utilizing the federally tariffed DSL transport to which it was entitled.

BellSouth provided its DSL product to CCC without complaint when it was provisioned on resale lines, but prior to the Kentucky PSC's ruling it would not provide the service over UNE loops. This prohibition led to higher costs and insurmountable operational barriers[9] which kept CCC out of the market for bundled voice and data.

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[7] See copy of the tariff included as an attachment to correspondence in Exhibit E.

[8] *Administrative Case No. 382, An Inquiry Into the Development of Deaveraged Rates for Unbundled Network Elements,* Order dated December 18, 2001 at 36 (emphasis added).

[9] Price is not the only consideration. BellSouth refuses to provide "hunt" as a feature between resale and UNE lines. Therefore, if the ADSL is attached to the main billing number of a small business customer Cinergy has very little chance of obtaining that customer for the following reasons: (a) If Cinergy converts the line to resale in order to offer DSL that line cannot hunt with the other voice lines resulting in busy signals, (b) if all lines are converted to resale there is insufficient margin to provide a competitive product,

BellSouth could provide no logical reason for such discrimination. Clearly, the intent was to prevent competitors utilizing UNE-P from providing a combination of voice and data to its customers, and BellSouth's anticompetitive strategy was very successful. The Kentucky PSC acted under state law to prohibit BellSouth's practices from having a "chilling effect on competition."[10]

Because of the Order of the Kentucky PSC, BellSouth can no longer discriminate in this fashion in Kentucky. CCC is now able to market a bundled offering of UNE-P, long distance, DSL and other services. This Order also provides broadband access for CCC's SuperLink VBX™ product in Kentucky utilizing line-splitting to provision DSL over its UNE loops.[11] BellSouth appealed this decision to Federal District Court. The Court affirmed this right and upheld the Kentucky PSC's decision and the terms of the interconnection agreement under the Act.[12]

CCC hereby requests that the FCC acknowledge the interconnection agreement between BellSouth and CCC in Kentucky and further requests that BellSouth be required to provide similar terms to CCC on a region-wide basis based upon BellSouth's tariffs and federal law.

(c) The DSL can be moved to a fax line, but the cost for doing so is substantial. BellSouth does not require this of itself, (d) BellSouth requested of the KPSC that Cinergy Communications be required to provide a stand-alone loop for DSL. The KPSC recognized that this was discriminatory because BellSouth did not require this of itself, it unnecessarily increased Cinergy Communications' costs. Moreover, the reason ADSL technology is used is precisely because it can be shared with the existing copper to the customer.

[10] BellSouth Telecommunications, Inc. v. Cinergy Communications Company, Civil Action No. 03-23-JMH, U.S. District Court Eastern District of Kentucky, *Memorandum Opinion and Order*, decided December 29, 2003 at 16. Attached hereto as Exhibit "A."

[11] The bulk of Cinergy Communications' customer base is in Indiana, Kentucky and Tennessee. Cinergy Communications can provide these services to the mass market only in Kentucky. BellSouth does not have an ILEC network in Indiana.

[12] BellSouth v. Cinergy at 17. Attached hereto as Exhibit "A."

B. *Res Judicata* Applies and Prevents the FCC From Acting on Bellsouth's Emergency Request

The U.S. District Court for the Eastern District of Kentucky issued its Order on BellSouth's appeal of the Kentucky PSC's decision on December 29, 2003.[13] This Order is a final judgment on the merits and resolves all legal issues arising out of the arbitration between CCC and BellSouth. The Federal Court is the final arbiter of the interconnection agreement between the parties.

Res Judicata applies and no action by the FCC or any other body may collaterally attack the interconnection agreement between BellSouth and CCC. Under the doctrine of *Res Judicata,* "a final judgment on the merits is an absolute bar to a subsequent action between the same parties or their privies based upon some claims or causes of action." Kane v. Magna Mixer Co., 71 F.3d 555, 560(6th Cir. 1995). "The doctrine precludes re-litigation of claims actually litigated as well as claims that could have been litigated." Richards v. Jefferson County, Ala., 517 U.S. 793, 797 n.4, 135 L.Ed. 2d 76, 116 S.Ct. 1761 (1996) ("The doctrine of *res judicata* rests at bottom upon the ground that the party to be affected, or some other with whom he is in privity, has litigated or had an opportunity to litigate the same matter in a former action in a court of competent jurisdiction."); Heyliger v. State Univ. and Cmty. Coll. Sys. Of Tenn., 126 F.3d 849, 852 (6th Cir. 1997).

Res Judicata is established with four (4) elements:

(1) a final decision was rendered on the merits in the first action by a court of competent jurisdiction;
(2) the second action involved the same parties or their privies as the first;

[13] BellSouth Telecommunications, Inc. v. Cinergy Communications Company, Civil Action No. 03-23-JMH, 2003 U.S. Dist. LEXIS 23976, U.S. District Court Eastern District of Kentucky, *Memorandum Opinion and Order*, decided December 29, 2003. Attached hereto as Exhibit "A."

(3) the second action raises issues actually litigated or which should have been litigated in the first action; and
(4) there is an identity of the causes of action.

Sanders Confectionery Prods., Inc. v. Heller Fin., Inc., 973 F.2d 474, 480 (6th Cir. 1992).

All of the elements of *Res Judicata* have been met. (1) The District Court is a court of competent jurisdiction and a decision was rendered on the merits when the decision of the Kentucky PSC was upheld in its entirety. (2) Both Bellsouth and CCC are parties to the District Court action and this Emergency Request. (3) All of BellSouth's preemption arguments were considered by the District Court and soundly rejected. (4) There is an identity to these two causes of action in that they are both affect the duties of the parties with respect to broadband issues.

This Emergency Request is nothing more than an attempt to re-litigate issues that have already been addressed. The Court agreed with CCC that CLECs are entitled to state law protection which may exceed the protection afforded by FCC regulations. The District Court recognized:

> The 1996 Act incorporated the concept of "cooperative federalism," whereby federal and state agencies "harmonize" their efforts and federal courts oversee this "partnership." *Michigan Bell, 323 F.3d at 352.* Quite clearly, the 1996 Act makes room for state regulations, orders and requirements of state commissions as long as they do not "substantially prevent" implementation of federal statutory requirements. The PSC's order, challenged here by BellSouth, embodies just such a requirement. 47 U.S.C. §251(d)(3)(C). It establishes a relatively modest interconnection-related condition for a local exchange carrier so as to ameliorate a chilling effect on competition for local telecommunications regulated by the commission.

As the District Court makes clear, this issue is about local competition, specifically an interconnection agreement allowing CCC to provide local service to its customers.

BellSouth has appealed the District Court Order to the Sixth Circuit Court of Appeals. This is the proper procedure. Since BellSouth already has an appeal pending,

the FCC should dismiss BellSouth's Request as it pertains to Kentucky, the Kentucky PSC and CCC. The FCC should defer judgment on these issues to the Sixth Circuit Court of Appeals.

C. The Kentucky Decision Was Based Upon State Law

The Kentucky PSC clearly stated that its decision was based upon state law. It determined that it would consider "whether BellSouth acts reasonably in refusing to provide DSL service to competitive carrier UNE-P customers under, inter alia, 47 U.S.C. §252(e) [which preserves state law] and KRS §278.280." July 12, 2002 Order at 2. Kentucky law provides:

> Whenever the commission . . . finds that the rules, regulations, practices, equipment, appliances, facilities or service of any utility subject to its jurisdiction . . . are unjust [or] unreasonable, . . . the commission shall determine the just [or] reasonable. . . practices, . . . service or methods to be observed, . . . and shall fix the same by its order, rule or regulation.

KRS §278.280(1). The Kentucky PSC determined that BellSouth violated the above statute because "its practice of **tying its DSL service** to its own voice service to increase its already considerable market power in the voice market **has a chilling effect on competition** and limits the prerogative of Kentucky customers to choose their own telecommunications carriers." July 12, 2002 Order at 7 (emphasis added).

The Kentucky PSC provided a remedy to this violation of state law by incorporating into the interconnection agreement terms and conditions which allow CCC to obtain ADSL over UNE-P.

D. Cinergy Communications' interconnection agreement relates to wholesale DSL services only

BellSouth's main argument is that CCC is not entitled to DSL over UNE or UNE-P because CLECs are not entitled to UNEs to provide broadband services. This argument misses the point because, "[t]he PSC's decision in this case relates only to BellSouth's wholesale offering of DSL transmission."[14] The FCC should not be distracted by BellSouth's references to the TRO and impairment because that is clearly not what is at issue in this case.[15] Instead, CCC is ordering the DSL transport service out of BellSouth's wholesale access tariff. The issue is whether CCC can utilize its UNE-P lines to also provide DSL to its customers. BellSouth provides ADSL to its own customers over the same loops. This is precisely the benefit of ADSL. CCC should also be entitled to this benefit on a nondiscriminatory basis.

CCC can get BellSouth's wholesale service out of the tariff without objection if the DSL is provisioned over a resale loop.[16] BellSouth admits that there is no technical reason why ADSL cannot be provided over UNE-P, and has in fact provided this combination of services to Cinergy in the past. The parties are operating without incident under the interconnection agreement in Kentucky. In fact, there hasn't been a single operational complaint by BellSouth to date! The real issue here is that BellSouth wants

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[14] BellSouth v. Cinergy Communications, 2003 U.S. Dist. LEXIS 23976 at 5-6. Exhibit "A" attached.
[15] The Indiana Utility Regulatory Commission found that CLECs were impaired without access to an unbundled broadband loop and ordered SBC to unbundled its "project pronto" architecture in Indiana. *In the Matter of the Commission Investigation and Generic Proceeding on Ameritech Indiana's Rates For Interconnection, Service, Unbundled Elements, and Transport and Termination Under the Telecommunications Act of 1996 and Related Indiana Statutes,* Cause No. 40611-S1, approved February 17, 2003, 2003 Ind. PUC LEXIS 116, pp. 79 – 90. Attached hereto as Exhibit "F." Approximately one week later, the FCC announced its Triennial Review Order and prohibited any state commissions from finding such UNEs. Cinergy Communications recognizes the distinction between UNEs and tariffed wholesale services.
[16] See Footnote 9 *Supra* for discussion on why resale is inadequate.

to monopolize the market for bundled voice and data services, as well as the market for advanced services, which require a last mile broadband connection.

The effect of this policy is clear. In Kentucky where the commission has required fair treatment, CCC can provide SuperLink VBX™ to mass market customers. In addition, CCC can offer an attractive bundle of local, long distance, and high speed data services to its customers on a single bill to the mass market and small business market. However, in Tennessee where CCC has not yet obtained relief from BellSouth's discriminatory policies, BellSouth has succeeding in creating a barrier to entry for the mass market and small business markets for bundled voice and data services. These discriminatory policies also create a barrier to entry to the advanced services market, successfully limiting CCC to the POTS-only market.[17]

E. Wholesale ADSL over UNE-P is Line Splitting

The District Court held that the Kentucky Public Service Commission decision resolved an issue regarding line splitting. Therefore, all of BellSouth's arguments regarding line sharing and/or a stand alone loop must be disregarded. BellSouth acknowledges that CCC is entitled to line splitting at page 16 of its Emergency Request for Declaratory Ruling:

> . . . CLECs, instead of relying on ILEC data services, can engage in innovative line-splitting arrangements to provide voice and data services and thus create greater product differentiation between the ILEC and CLEC offerings.

In this case, BellSouth doesn't argue that CCC shouldn't be allowed to engage in line-splitting to obtain ADSL, but rather argues that CCC shouldn't be allowed to line split

[17] See "POTS becomes old School" by Kirk Laughlin and "Broadband Changes the Way the Game is Played" by Shira Levine, both in Telephony Magazine, January 2004. Both articles attached hereto as Exhibit "D."

utilizing BellSouth's federally tariffed service. CCC's line splitting arrangement is certainly "innovative" and the right to continue the practice was correct on the part of the state commission. CCC's SuperLink VBX™ provides immediate proof of the product differentiation sought by BellSouth. Without the ability to use wholesale offerings to line-split, the CLEC industry will certainly be limited to "me-too" POTS-only services.

BellSouth, as it so often does, has erected a strawman by referring to DSL over UNE-P as line sharing. Line sharing is not implicated in this case by definition. CCC wants access to the entire loop and does not want to share with anybody. Rather, CCC desires to split the UNE-P and "Commingle" its own DSL service which it gets at wholesale from BellSouth's Federal Access Tariff. For this reason, all of BellSouth's arguments regarding line sharing must be ignored.

III. CINERGY COMMUNICATIONS' REQUEST FOR DECLARATORY RULING AND PENALTIES

A. New Commingling Rule Implicates Change of Law Provisions and Requires BellSouth to Provision its Wholesale DSL over UNE-P.

The Kentucky Public Service Commission did not consider the issue of "Commingling" in its decision. Commingling is required by new rule 47 CFR § 51.309 which became effective as of October 2, 2003. This rule provides in relevant part:

> (e) Except as provided in 51.318, an incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled network element or combination of unbundled network elements with wholesale services obtained from an incumbent LEC.
> (f) Upon request, an incumbent LEC shall perform the functions necessary to commingle an unbundled network element or a combination of network elements with one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC.

Based upon the plain language of the rule, Cinergy Communications is entitled to commingle wholesale DSL with UNE loops (including UNE-P). CCC believes that the contract language agreed upon by the parties in Kentucky would resolve this issue. However, BellSouth refuses to comply with "a relatively modest interconnection-related condition for a local exchange carrier so as to ameliorate a chilling effect on competition for local telecommunications regulated by the Commission."[18]

Effective October 17, 2003, BellSouth incorporated the concept of "Commingling" into its Access Service Tariff as required by 47 CFR § 51.309. "Commingling" is defined at 47 CFR § 41.5:

> Commingling. Commingling means the connecting, attaching, or otherwise linking of an unbundled network element, or a combination of network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC. . . .

This is precisely the relief afforded CCC in Kentucky – commingling an unbundled copper loop with wholesale DSL transport. BellSouth has adopted this concept in its tariff, but it refuses to provide commingling to CCC throughout the remainder of its territory.

BellSouth's tariff provides:

> 2.2.3 Commingling
> (A) Except as provided in Section 51.318 of the Federal Communications Commission's rules, telecommunications carriers who obtain unbundled network elements (UNEs) or combinations of UNEs pursuant to a Statement of Generally Available Terms, under Section 252 of the Act, or pursuant to an interconnection agreement with the Telephone Company, may connect, combine or otherwise attach such UNEs or combination of UNEs to Access services purchased under this tariff except to the extent such agreement explicitly:
> (1) prohibits such commingling; or

[18] BellSouth Telecommunications, Inc. v. Cinergy Communications Company, Civil Action No. 03-23-JMH, U.S. District Court Eastern District of Kentucky, *Memorandum Opinion and Order*, decided December 29, 2003 at 15. Attached hereto as Exhibit "A."

(2) requires the parties to complete the procedures set forth in the agreement regarding change of law prior to implementing such commingling.

(B) The rates, terms, and conditions of this Tariff will apply to the Access Services that are commingled.

This language applies to all Access services purchased under the tariff. DSL access is one of the services CCC purchases under this tariff. Therefore, CCC should be allowed to commingle this with UNEs or combination of UNEs (i.e. UNE loop or UNE-P loop).

Based upon the limitation of 2.2.3(A)(2) of the Tariff above, CCC properly followed Change of Law provisions of the interconnection agreements with BellSouth by providing written demand for commingling of UNE loops and UNE-P loops with wholesale DSL purchased out of the BellSouth access tariff. CCC provided BellSouth the relevant provisions of the parties' Kentucky interconnection agreement and requested that document form the basis for good faith negotiations.[19]

BellSouth argues that there is no commingling because there is no "Connecting, attaching, or combining" of a UNE with a tariffed facility. In support of this position, BellSouth gives several reasons why there is no separate UNE for the low frequency portion of the loop under a Line-Sharing analysis. As discussed in Section II.E. above, the arrangement CCC is requesting is not Line-Sharing, but rather Line-Splitting whereby the UNE loop is "commingled" with the tariffed DSL service.

The DSL and POTS services are "attached" to each other in that they are carried on the same loop. The DSL and POTS services are "connected" at the splitter which divides the high and low frequency portions of the loop. The DSL and POTS services are "combined" by CCC to provide a bundled offering to its customers on a single bill.

[19] See Correspondence between Cinergy Communications and BellSouth attached hereto as Exhibit E.

Obviously, this is commingling under the plain meaning of the rule despite BellSouth's highly suspect protestations to the contrary.

BellSouth has held steadfastly to its Line-Sharing perspective and has refused to even consider the argument put forth by CCC. BellSouth recently assigned a new attorney to negotiate with CCC. This new attorney admitted that she was unfamiliar with the commingling provisions of BellSouth's tariff and had never read the FCC's commingling rules.[20] CCC has provided this information to BellSouth, but to date BellSouth has failed to respond.

BellSouth refused CCC's repeated requests for face-to-face meetings in BellSouth's Atlanta offices or other location convenient to BellSouth. Also, BellSouth refused to escalate the matter to a representative of BellSouth which had authority to negotiate in good faith. Cinergy was left to deal with a representative of BellSouth that did not understand the issue, was unprepared, and had no authority other than to say "no" to CCC's proposed compromise solutions. For all of these reasons, BellSouth's negotiating tactics are far from the good faith required by the interconnection agreement and the Act. BellSouth is digging in its heels and forcing CLECs such as CCC to litigate the matter to get rights to which they are entitled.

Expensive and time-consuming litigation and the attendant regulatory uncertainty is an effective barrier to competitive entry. However, this broadband access issue is so important to the survival of our company that CCC is prepared to litigate in each state commission and Federal Court necessary to obtain nondiscriminatory access to this essential bottleneck facility. The FCC could avoid unnecessary cost and expense by

[20] FCC's Triennial Review Order ¶¶ 579 – 584.

enforcing its own rules and declaring that commingling applies to BellSouth's wholesale DSL service and UNE-P.

B. Penalties Must Be Imposed to Prevent Further Anticompetitive Conduct

BellSouth's lack of good faith should not be tolerated by the FCC. Instead, the FCC should impose penalties as it indicated it would do at paragraph 581 of the Triennial Review Order:

> Thus, we find that a restriction on commingling would constitute an "unjust and unreasonable practice" under 201 of the Act, as well as an "undue and unreasonable prejudice or advantage" under section 202 of the Act. Furthermore, we agree that restricting commingling would be inconsistent with the nondiscrimination requirements of 251(c)(3). Incumbent LECs place no such restrictions on themselves for providing service to any customers by requiring, for example, two circuits to accommodate telecommunications traffic from a single customer or intermediate connections to network equipment in a collocation space. For these reasons, we require incumbent LECs to effectuate commingling by modifying their interstate access tariffs to expressly permit connections with UNEs and UNE combinations.

In footnote 1792 at the end of paragraph 581, the FCC notes that sections 202 and 203 provide specific penalties for noncompliance:

> These amounts have been adjusted to $7,600 for each offense and $330 for each day of the continuing offense. 47 C.F.R. § 1.80(b)(4). Thus, any incumbent LEC policy or practice that has the effect of prohibiting commingling could subject the incumbent LEC to enforcement action for imposing an "undue or unreasonable prejudice or advantage" upon competitive LECs

BellSouth knew of these penalties and the consequences of its actions because CCC informed them of this information in correspondence.[21] BellSouth's refusal to negotiate in good faith or even acknowledge CCC' right to commingling is unreasonable and prejudicial. As such, BellSouth should bear the consequences of intentional anticompetitive behavior.

[21] See correspondence attached hereto as Exhibit "E."

C. Penalties Must be Awarded to Cinergy Communications as Compensation

CCC has expended, and continues to expend, large amounts of legal resources and money to uphold the rights to which it is entitled under the Tariff, FCC rules, and the Act. Unless BellSouth is penalized, and the funds directed to CCC to offset its mounting business losses as well as litigation expenses, then BellSouth will be rewarded for its monopolistic practices to date. If there is not penalty, a message will be sent to Bellsouth that stonewalling is not only legal, but also a prudent business maneuver. This message will likely spawn further plans for anticompetitive activity.

The recent U.S. Supreme Court decision in Verizon Communications v. Trinko removed all threat of antitrust litigation from the incumbent LECs. In order for the regulatory scheme to work as suggested by Justice Scalia, the FCC has a constitutional duty to provide a check on the power of the incumbent LEC and prevent barriers to entry for competitive entry. At the very least, the FCC must enforce the tariffs that are subject to its jurisdiction and filed under its rules. Unless there is a financial penalty associated with monopolistic behavior, small CLECs like CCC will be crushed by the anticompetitive activities of BellSouth and the other incumbent LECs.

CCC requests that the FCC open an enforcement action, and appropriately fine BellSouth according to the statute. The funds from such penalties should then be directed to CCC for its financial loss associated with the violation, including: loss of business, loss of business opportunity, delay in launch to market, increased operational expenses, and legal and administrative expenses. Without restitution of the type requested here, CCC will have still suffered a severe economic blow. The economic burden of "delay

and deny" tactics must not fall squarely upon the competitive market, but rather the injured party should be made whole to level the playing field.

III. CONCLUSION

For all the above and foregoing reasons, the FCC should acknowledge the interconnection agreement between BellSouth and CCC in Kentucky because it was arbitrated pursuant to Section 252 of the Act and upheld on appeal by the Federal District Court. The issue in that case was decided on state law and the federal court has already determined that this decision is not preempted by FCC rules. Due to the unique facts of this case, the FCC should treat CCC's relationship with BellSouth independently of any other relief requested. *Res Judicata* prevents the FCC from altering the terms of the interconnection arrangement agreed to by the parties. The business arrangement in Kentucky resulting from that interconnection agreement has been successful, and there have been no operational complaints to date. There is no reason for the FCC to act on BellSouth's Emergency Request and it should deny all relief requested as it relates to CCC and Kentucky.

Cinergy Communications has requested that BellSouth extend the terms of the Kentucky interconnection agreement to the remainder of the states in the BellSouth region based upon the FCC's new commingling rules. BellSouth has refused to negotiate in good faith, thereby denying CCC rights to which it is entitled. Each day that goes by CCC is losing customers in Tennessee and elsewhere as a result of its inability to provide a bundled service via commingling. The Commission should enter a declaratory ruling that prevents BellSouth from dragging its feet any further on this issue. Moreover, the

FCC should impose penalties upon BellSouth pursuant to sections 202 and 203 of the Act, and order that those funds be paid directly to CCC as compensation.

WHEREFORE, for the above and foregoing reasons, *Res Judicata* applies to the December 29, 2003 Order of the U.S. District Court. That Order upheld the interconnection agreement between BellSouth and Cinergy Communications and ruled that no FCC preemption applied to the terms of the agreement or the Kentucky PSC's decision. This decision cannot be collaterally attacked by in this forum by BellSouth's Emergency Request. Therefore, the FCC should deny BellSouth's Emergency Request as it relates to CCC, Kentucky and the Kentucky PSC.

WHEREFORE, for the above and foregoing reasons Cinergy Communications is entitled to commingle wholesale DSL purchased out of BellSouth's federal access tariff with UNE loops and utilize Line-Splitting to provide a bundled service offering to its end-user customers.

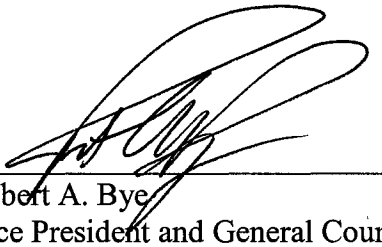
WHEREFORE, for the above and foregoing reasons, Cinergy Communications respectfully requests that the Federal Communications Commission enter its Declaratory Order requiring BellSouth to commingle DSL transport purchased out of its Tariff with UNE loops purchased out of an interconnection agreement.

WHEREFORE, Cinergy Communications respectfully requests that the Federal Communications Commission impose penalties against BellSouth for the benefit of Cinergy Communications pursuant to Sections 202 and 203 of the Act for prohibiting

commingling and imposing an "undue or unreasonable unreasonable prejudice or disadvantage" upon CCC as the FCC indicated it would do in paragraph 581 and footnote 1792 of the Triennial Review Order.

WHEREFORE, Cinergy Communications respectfully requests that the Federal Communications Commission retain jurisdiction of this matter with respect to states other than Kentucky until such time as an amendment to the interconnection agreement between the parties is complete and BellSouth has demonstrated compliance by providing nondiscriminatory access to the requested services.

Respectfully submitted,



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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
BellSouth Telecommunications, Inc.	)	
Request for Declaratory Ruling that State	)	
Commissions May Not Regulate Broadband	)	WC Docket No. 03-251
Internet Access Services By Requiring	)	
BellSouth to Provide Wholesale or Retail	)	
Broadband Services to CLEC UNE Voice	)	
Customers	)	

CINERGY COMMUNICATIONS COMPANY
EXHIBITS A - F

EXHIBIT A

1 of 1 DOCUMENT

BELLSOUTH TELECOMMUNICATIONS, INC., PLAINTIFF, v. CINERGY COMMUNICATIONS COMPANY, et al., DEFENDANTS.

CIVIL ACTION NO. 03-23-JMH

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

2003 U.S. Dist. LEXIS 23976

December 29, 2003, Decided

DISPOSITION: [*1] AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Plaintiff incumbent local exchange carrier (ILEC) sought review of a Kentucky Public Service Commission (PSC) decision which held that the ILEC could not refuse to provide Digital Subscriber Line (DSL) service pursuant to a request from an Internet service provider who served, or who wished to serve, a customer who chose to receive voice service from a Competitive Local Exchange Carrier (CLEC), of which defendant was one.

OVERVIEW: The ILEC asserted that the PSC's decision purported to regulate interstate telecommunications services in a manner that was directly contrary to binding Federal Communications Commission (FCC) rulings and to the ILEC's federal tariff. The ILEC argued that PSC's order had to fail because of federal preemption, stating that, as a matter of federal law, the FCC - not state commissions - had exclusive jurisdiction over interstate communications. The court held that nothing in the state regulations stood as an obstacle to the accomplishment and execution of the full objectives of Congress. The Telecommunications Act of 1996 (1996 Act), P.L. 104-104, incorporated the concept of cooperative federalism, whereby federal and state agencies harmonized. Quite clearly, the 1996 Act made room for state regulations, orders and requirements of state commissions as long as they did not substantially prevent implementation of federal statutory requirements. The PSC's order embodied just such a requirement. It established a relatively modest interconnection-related condition for the ILEC so as to ameliorate a chilling effect on competition for local telecommunications regulated by the PSC.

OUTCOME: The PSC's decision was affirmed.

CORE TERMS: telecommunications, customer, interconnection, internet, regulation, state commission, arbitration, negotiation, carrier, state law, transmission, interstate, provider, retail, broadband, network, Telecommunications Act, arbitrary and capricious, chilling effect, federal law, line-splitting, capabilities, high-speed, competitors, offering, substantial evidence, competitive, unsupported, telephone line, preempted

LexisNexis (TM) HEADNOTES - Core Concepts:

Communications Law > Federal Acts > Telecommunications Act

[HN1] The Telecommunications Act of 1996, P.L. 104-104, places certain obligations on incumbent local exchange carriers - the companies that have traditionally offered local telephone service in particular areas. These obligations are intended to assist new local telecommunications providers. These new local competitors are often referred to as competitive local exchange carriers or "CLECs."

Communications Law > Federal Acts > Telecommunications Act

[HN2] Incumbent local exchange carriers (ILECs) must, among other things, lease to their competitors for the provision of a telecommunications service, nondiscriminatory access to network elements on an

unbundled basis. *47 U.S.C.S. § 251*(c)(3). In addition to requiring access to Unbundled Network Elements, the Telecommunications Act of 1996, P.L. 104-104, requires ILECs to offer their complete, finished retail telecommunications services provided to end users, to new entrants for resale. *47 U.S.C.S. § 251*(c)(4).

Communications Law > Federal Acts > Telecommunications Act
[HN3] The Telecommunications Act of 1996 (1996 Act), P.L. 104-104, contains a specific scheme for implementing the new obligations imposed by the federal statute. This scheme contains three parts. First, Congress intends the mandates of *47 U.S.C.S. § 251* to be implemented in the first instance through the negotiation of private, consensual agreements between incumbent local exchange carriers (ILECs) and competitive local exchange carriers (CLECs). Thus, § 251 imposes on both ILECs and CLECs the duty to negotiate in good faith in accordance with *47 U.S.C.S. § 252* the particular terms and conditions of agreements to fulfill the specific duties imposed on incumbents by *47 U.S.C.S. § 251*.

Communications Law > Federal Acts > Telecommunications Act
[HN4] The Telecommunications Act of 1996 (1996 Act), P.L. 104-104, contains a specific scheme for implementing the new obligations imposed by the federal statute. Second, as a backstop to reliance on privately negotiated agreements, Congress has enlisted the aid of state public utility commissions. If the parties are unable to agree on all issues within 135 days after the competitor's initial request for negotiation, either party may petition the state commission to arbitrate any "open issues." *47 U.S.C.S. § 252*(b)(1). Regardless of whether the parties reach agreement through voluntary negotiation, mediation, or arbitration, the private parties must submit their agreement to the relevant state commission for approval. *47 U.S.C.S. § 252*(e)(1). Third, and lastly, state commission decisions under this statute are subject to review in federal district courts for conformity with the terms of the 1996 Act. *47 U.S.C.S. § 252*(e)(6).

Administrative Law > Judicial Review > Standards of Review > Standards Generally
[HN5] The United States Court of Appeals for the Sixth Circuit has adopted and utilized a two-tiered review procedure when reviewing a ruling of a state administrative body.

Communications Law > Federal Acts > Telecommunications ActAdministrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious ReviewAdministrative Law > Judicial Review > Standards of Review > De Novo Review
[HN6] The federal judiciary first reviews de novo whether a state public service commission's orders comply with the requirements of the Telecommunications Act of 1996 (1996 Act), P.L. 104-104. The court also reviews a state public service commission's interpretation of the 1996 Act de novo, according little deference to the state public service commission's interpretation. If no illegality is uncovered during such a review, the question of whether the state commission's decision is correct must then be analyzed, but under the more deferential arbitrary-and-capricious standard of review usually accorded state administrative bodies' assessments of state law principles.

Administrative Law > Judicial Review > Standards of Review > Arbitrary & Capricious Review
[HN7] The arbitrary and capricious standard is the most deferential standard of judicial review of agency action, upholding those outcomes supported by a reasoned explanation, based upon the evidence in the record as a whole. A court will uphold the decision if it is the result of a deliberate principled reasoning process, and if it is supported by substantial evidence. Thus, absent clear error in interpretation of federal law or unsupported, arbitrary and capricious findings by a state commission, the decisions of state commissions generally stand.

Communications Law > Federal Acts > Telecommunications Act
[HN8] See *47 U.S.C.S. § 252*(b)(4)(a).

Communications Law > Federal Acts > Telecommunications Act
[HN9] The United States Supreme Court has recognized that Telecommunications Act of 1996, P.L. 104-104, cannot divide the world of domestic telephone service "neatly into two hemispheres," one consisting of interstate service, over which the Federal Communications Commission (FCC) has plenary authority, and the other consisting of intrastate service, over which the states retain exclusive jurisdiction. Rather, observed the Supreme Court, the realities of technology and economics belie such a clean parceling of responsibility. The FCC noted that state commission authority over interconnection agreements pursuant to *47 U.S.C.S. § 252* extends to both interstate and intrastate matters.

Constitutional Law > Supremacy Clause
[HN10] State laws can be expressly or impliedly preempted by federal law. Federal law may preempt state law when federal statutory provisions or objectives would be frustrated by the application of state law.

Moreover, where Congress intends for federal law to govern an entire field, federal law preempts all state law in that field. The United States Court of Appeals for the Sixth Circuit has held that when a state law is not expressly preempted, courts must begin with the presumption that the law is valid. It will not be presumed that a federal statute was intended to supersede the exercise of power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly presumed.

Constitutional Law > Supremacy ClauseCommunications Law > Federal Acts > Telecommunications Act
[HN11] When Congress enacted the Telecommunications Act of 1996 (1996 Act), P.L. 104-104, it did not expressly preempt state regulation of interconnection. In fact, it expressly preserved existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition. Specifically, *47 U.S.C.S. § 251*(d)(3) of the 1996 Act states that the Federal Communications Commission shall not preclude enforcement of state regulations that establish interconnection and are consistent with the 1996 Act. *47 U.S.C.S. § 251*(d)(3).

Constitutional Law > Supremacy ClauseCommunications Law > Federal Acts > Telecommunications Act
[HN12] The Telecommunications Act of 1996 (1996 Act), P.L. 104-104, permits a great deal of state commission involvement in the new regime it sets up for the operation of local telecommunications markets, as long as state commission regulations are consistent with the 1996 Act. Congress has made clear that the states are not ousted from playing a role in the development of competitive telecommunications markets however, Congress did not intend to permit state regulations that conflicted with the 1996 Act. Thus, a state may not impose any requirement that is contrary to terms of *47 U.S.C.S. § 251*-261 or that stands as an obstacle to the accomplishment and execution of the full objectives of Congress. According to the Federal Communications Commission, as long as state regulations do not prevent a carrier from taking advantage of *47 U.S.C.S. § § 251,* 252 of the 1996 Act, state regulations are not preempted.

Constitutional Law > Supremacy ClauseCommunications Law > Federal Acts > Telecommunications Act
[HN13] The Telecommunications Act of 1996 (1996 Act), P.L. 104-104, incorporates the concept of "cooperative federalism," whereby federal and state agencies "harmonize" their efforts and federal courts oversee this "partnership." Quite clearly, the 1996 Act makes room for state regulations, orders and requirements of state commissions as long as they do not "substantially prevent" implementation of federal statutory requirements.

Governments > State & Territorial Governments > Licenses
[HN14] See *Ky. Rev. Stat. Ann. § 278.280(1).*

COUNSEL: Plaintiff, BellSouth Telecommunications, Inc. represented by Dorothy J. Chambers BellSouth Telecommunications, Inc., Louisville, KY, Mark R. Overstreet, Stites & Harbison, Frankfort, KY, Sean A. Lev, Kellogg, Huber, Hanse, Todd & Evans, P.L.L.C., Washington, DC.

Defendant, Cinergy Communications Company, a Kentucky corporation represented by C. Hatfield, Middleton & Reutlinger, Louisville, KY, Robert Bye, Cinergy Communications Company, Overland Park, KS.

Kentucky Public Service Commission, represented by Amy E. Dougherty, Public Service Commission of Kentucky, Frankfort, KY, Deborah Tully Eversole, Public Service Commission of Kentucky, Frankfort, KY.

Martin J. Huelsman, in his official capacity as Chairman of the Kentucky Public Service Commission represented by Amy E. Dougherty, Public Service Commission of Kentucky, Frankfort, KY, Deborah Tully Eversole Public Service Commission of Kentucky, Frankfort, KY.

Gary W. Gillis, in his official capacity as Vice Chairman of the Kentucky Public Service Commission represented by Amy F. Dougherty, Public Service Commission of Kentucky, Frankfort, KY, Deborah Tully Eversole, Public Service Commission of Kentucky, **[*2]** Frankfort, KY.

Robert F. Spurlin, in his official capacity as a Commissioner of the Kentucky Public Service Commission represented by Amy F. Dougherty, Public Service Commission of Kentucky, Frankfort, KY, Deborah Tully Eversole, Deborah Tully Eversole, Public Service Commission of Kentucky, Frankfort, KY.

JUDGES: Joseph M. Hood, United States District Judge.

OPINIONBY: Joseph M. Hood

OPINION:

MEMORANDUM OPINION AND ORDER

In this action, BellSouth Telecommunications, Inc. ("BellSouth") seeks review of a Kentucky Public Service Commission ("PSC" or "Commission") decision. The decision at issue was the result of an arbitration conducted by the Commission pursuant to Sections 251 and 252 of the Telecommunications Act of 1996, *47 U.S.C. § § 251-252* (the "1996 Act"). The crux of the decision to which BellSouth objects states that:

> BellSouth may not refuse to provide Digital Subscriber Line ("DSL") service pursuant to a request from an Internet service provider who serves, or who wishes to serve, a customer who has chosen to receive voice service from a Competitive Local Exchange Carrier ("CLEC") that provides service over the Unbundled Network Elements **[*3]** Platform ("UNE-P")

Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252; Case 2001-00432, October 15, 2002 Order. BellSouth asserts that the Commission's decision purports to regulate interstate telecommunications services in a manner that is directly contrary to binding Federal Communications Commission ("FCC") rulings and to BellSouth's federal tariff. BellSouth also claims that the Commission should never have decided the issue presented in this case because it was not set forth in Cinergy's arbitration petition as required by the 1996 Act. Additionally, BellSouth argues that the PSC's decision was arbitrary and unsupported by the record.

I. BACKGROUND

A. Procedural Background

Cinergy is a privately-owned, Kentucky corporation which has been operating in Kentucky as a telecommunications provider since 1977. To facilitate its service to Kentucky residents, Cinergy entered into an initial interconnection agreement with BellSouth which expired on November 29, 2001. On May 30, 2001, Cinergy commenced negotiations with **[*4]** BellSouth for a new interconnection agreement pursuant to *Section 251 of the 1996 Act*. Despite a number of negotiation sessions over the next several months, the parties were unable to reach agreement on a number of issues. As a result, on December 10, 2001, Cinergy filed a Petition for Arbitration pursuant to *Section 252 of the 1996 Act*, requesting the PSC resolve sixteen disputed issues.

BellSouth filed its formal Response to the Petition on January 3, 2002, admitting the Commission had jurisdiction over the issues raised by Cinergy. The Commission set a procedural schedule for resolution of the case. Pursuant to the schedule, the parties filed agreed-upon portions of the interconnection agreement, as well as "Best and Final Offers" on the disputed issues. On January 31, 2002, the Commission Staff sponsored an informal conference at which the remaining issues were discussed and debated, including the precise issue BellSouth claims was not properly part of the proceeding. Limited discovery occurred, followed by the filing of direct, and some rebuttal testimony by the parties.

As a result of continued settlement negotiations, only four issues were ultimately submitted to, and decided **[*5]** by, the Commission. The Commission heard the case in a formal hearing on May 22, 2002, which lasted a full day. The parties filed post-hearing briefs, proposed findings of fact and conclusions of law, and an additional brief on a specific issue requested by the Commission. The Commission issued its decision on July 12, 2002. n1

> n1 PSC Chairman Huelsmann dissented on the issue of BellSouth's refusal to provide Broadband services to a customer of a CLEC who is providing voice services via UNE-P citing regulatory uncertainty, inconsistency with FCC rulings, and lack' of harm to Cinergy as the main reasons for his dissent.

Both parties sought clarification or rehearing of the Commission's Order. On October 15, 2002, the Commission clarified its Order, and issued a further Order on February 28, 2003, necessitated by the parties' inability to agree on the language for the interconnection agreement which would effectuate the Commission's decisions. On March 20, 2003, the parties submitted the interconnection agreement **[*6]** to the Commission, containing language specified by the Commission, on the disputed provisions. The Commission approved the interconnection agreement on April 21, 2003.

BellSouth commenced the present appeal by filing its complaint on May 9, 2003. Timely answers and briefs were filed. BellSouth challenges only the Commission's decision that BellSouth may not refuse to provide DSL capabilities to customers for whom a CLEC, such as Cinergy, is the voice provider through means of the UNE-P.

B. The Telecommunications Act of 1996

[HN1] The 1996 Act places certain obligations on incumbent local exchange carriers ("ILECs") such as BellSouth - the companies that have traditionally offered local telephone service in particular areas. These obligations are intended to assist new local

telecommunications providers such as Cinergy, AT&T, and MCI; these new local competitors are often referred to as competitive local exchange carriers or "CLECs."

[HN2] ILECs like BellSouth must, among other things, lease to their competitors "for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis." See *47 U.S.C. § 251(c)(3).* **[*7]** n2 In addition to requiring access to UNEs, the 1996 Act requires ILECs such as BellSouth to offer their complete, finished retail telecommunications services provided to end users, to new entrants for resale. See *47 U.S.C. § 251(c)(4).*

n2 These "network elements" are piece parts of the local telecommunications network.

[HN3] The 1996 Act contains a specific scheme for implementing the new obligations imposed by the federal statute. This scheme contains three parts. *First,* Congress intended the mandates of *Section 251* to be implemented in the first instance through the negotiation of private, consensual agreements between ILECs and CLECs. Thus, *Section 251* imposes on both ILECs and CLECs "the duty to negotiate in good faith in accordance with *Section 252* of this title the particular terms and conditions of agreements to fulfill" the specific duties imposed on incumbents by *Section 251.* [HN4] *Second,* as a backstop to reliance on privately negotiated agreements, Congress enlisted the aid **[*8]** of state public utility commissions like the PSC. If the parties are unable to agree on all issues within 135 days after the competitor's initial request for negotiation, either party may petition the state commission to arbitrate any "open issues." *47 U.S.C. § 252(b)(1).* Regardless of whether the parties reach agreement through voluntary negotiation, mediation, or arbitration, the private parties must submit their agreement to the relevant state commission for approval. *See id. § 252(e)(1). Third,* and lastly, state commission decisions under this statute are subject to review in federal district courts for conformity with the terms of the Act. *See id. § 252(e)(6).*

C. Factual Background

Until recently, customers wishing to access the Internet relied chiefly upon "dial-up" services that relied on the voice channel of a basic telephone line to transmit and receive data at relatively low speeds. Over the last several years, however, BellSouth and other companies have invested billions of dollars to make "broadband" internet access available - that is, to provide access at much higher speeds. n3

n3 In an earlier case in front of the PSC, *Review of BellSouth Telecommunications, Inc.'s Price Regulation Plan,* KPSC Case 99-434. Order, Aug. 3, 2000, the Commission conducted a review of BellSouth's rates, earnings, and method of regulation. Finding that the Company had excess earnings, BellSouth faced the prospect that the Commission would require it to substantially reduce the rates of its retail ratepayers by millions of dollars. BellSouth proposed to keep the excess earnings in order to build a broadband network into rural markets in Kentucky where standard business case analysis would not support such an investment. BellSouth stated that it would "make these same capabilities available to its competitors on a wholesale basis and therefore, would not have any competitive advantage." *Cinergy Hearing Exhibit 1 (Cinergy App. 3).* The Commission accepted BellSouth's proposal.

[*9]

There are several competing technologies that provide such high-speed broadband transmission for Internet access. For instance, one of the leading technologies is cable modem service offered over cable television facilities - not telephone lines - by companies such as AOL Time Warner. BellSouth offers a competing high-speed transmission service that does use telephone lines. This service is known as DSL. DSL makes use of the portion of the spectrum on a basic copper telephone line (also known as a "local loop") that is not used for voice services. DSL thus enables customers to download information from the Internet at high speeds without interfering with the normal operation of the voice channel on the telephone line.

By itself, DSL service is simply a high-speed data transmission (or transport) service. One can conceptualize DSL as the offering of a particularly large pipe for the transmission of data. In order to provide broadband Internet access on a retail basis, one must combine that DSL transmission service (the pipe) with the information routing and processing capabilities (the water running through the pipe) offered by an Internet Service Provider or "ISP" such as America **[*10]** Online or Earthlink.

BellSouth combines those two functions in its retail high-speed Internet access service, known as FastAccess. In addition to that retail service, BellSouth offers wholesale DSL transmission to independent ISPs so those companies can combine DSL transmission with their own capabilities in order to provide finished broadband Internet access to retail customers. The PSC's

decision in this case relates only to BellSouth's wholesale offering of DSL transmission.

The PSC ruled that BellSouth may not refuse to provide DSL service pursuant to a request from an Internet service provider who serves, or wishes to serve, a customer who has chosen to receive voice service from a CLEC that provides service over the UNE-P. In other words, the PSC determined that BellSouth may not refuse to provide DSL to Cinergy, AT&T, and MCI customers; a Kentucky customer must be able to obtain DSL service regardless of the voice carrier he chooses.

II. STANDARD OF REVIEW

Along with the majority of other circuits, [HN5] the Sixth Circuit has adopted and utilized a two-tiered review procedure when reviewing a ruling of a state administrative body. This bifurcated standard is employed **[*11]** because arriving at a decision in these types of disputes involves an understanding of the interplay between federal and state law.

[HN6] The federal judiciary first reviews *de novo* whether a state public service commission's orders comply with the requirements of the Telecommunications Act. The Court also reviews the Commission's interpretation of the Act de novo, according little deference to the Commission's interpretation. *Michigan Bell Tel. Co. v. Strand 305 F.3d 580, 586 (6th Cir. 2002)*. If no illegality is uncovered during such a review, the question of whether the state commission's decision is correct must then be analyzed, but under the more deferential arbitrary-and-capricious standard of review usually accorded state administrative bodies' assessments of state law principles. See *Michigan Bell Tel. Co. v. MFS Intelenet of Michigan, Inc., 339 F.3d 428, 433 (6th Cir. 2003)*; *Southwestern Bell Tel. Co. v. Pub. Util. Commn of Texas, 208 F.3d 475, 482 (5th Cir. 2000)*; *GTE South, Inc. v. Morrison, 199 F.3d 733, 745 (4th Cir. 1999)*; *U.S. West Communications v. MFS Intelenet, Inc., 193 F.3d 1112, 1117 (9th Cir. 1999)*. **[*12]**

[HN7] The arbitrary and capricious standard is the most deferential standard of judicial review of agency action, upholding those outcomes supported by a reasoned explanation, based upon the evidence in the record as a whole. *See Killian v. Healthsource Provident Adm'rs, Inc., 152 F.3d 514, 520 (6th Cir. 1998)*. The Court will uphold decision "if it is the result of a deliberate principled reasoning process, and if it is supported by substantial evidence." *Id.* Thus, absent clear error in interpretation of federal law or unsupported, arbitrary and capricious findings by a state commission, the decisions of state commissions generally stand. *Michigan Bell Tel. Co. v. MCIMetro Access Trans. Svcs. Inc., 323 F.3d 348, 353 (6th Cir. 2003)* (citing *Michigan Bell Tel. Co., 305 F.3d at 586-87.*

III. ANALYSIS

A. Whether the PSC violated *Section 252(b) of the Act*

[HN8] *Section 252(b)(4)(A) of the 1996 Act* states that a "State commission shall limit its consideration of any petition . . . to the issues set forth in the petition and in the response, if any." *47 U.S.C. § 252(b)(4)(A).* Cinergy filed a petition **[*13]** with the PSC that set forth fifteen unresolved issues arising out of interconnection negotiations with BellSouth. As stated above, due to continued negotiations, only four of these issues were ultimately addressed by the Commission.

BellSouth contends that one of the issues ultimately decided by the Commission, BellSouth's alleged obligation to continue to provide DSL service over CLEC UNE-P lines, was not raised in Cinergy's petition for arbitration. BellSouth relies on the plain language of *Section 252(b)(4)(A)* and states that it is improper for state commissions to resolve issues not presented in a petition for arbitration under the 1996 Act. Issues related to issues actually raised in a petition are, in BellSouth's opinion, not to be arbitrated by the PSC because of lack of notice to the parties. In any event, BellSouth contends, the issue ultimately decided by the PSC is in no way related to the issue set forth in Cinergy's original petition. Therefore, BellSouth argues that the PSC's ruling requiring BellSouth to provide DSL service on a UNE-P line was inappropriate and in violation of *Section 252(b).*

Cinergy takes the position that the Act does not require precise pleadings **[*14]** and, once an issue is open, the PSC has the discretion to review related issues. Relying on *TCG Milwaukee, Inc. v. Public Service Com'n of Wisconsin, 980 F. Supp. 992 (W.D. Wis. 1997)*, Cinergy states that once the parties create an open issue, the PSC has considerable latitude to resolve the related issues necessary to finalize the interconnection agreement and make it a working document. Cinergy also contends that BellSouth had sufficient notice that this was an issue before the Commission. The issue of DSL over UNE-P was debated by the parties at the informal conference, again at the hearing, and once again in the briefs, all without objection from BellSouth.

The PSC determined in its October 15, 2003, Order that the DSL issue was "directly related" to the line-splitting issue that Cinergy raised as Issue No. 7 in its original petition, and that both parties had addressed this issue at later points in the proceeding. n4 Therefore, the PSC determined that the issue of DSL over the UNE-P was properly before the Commission. We agree and find no violation of *Section 252 (b).*

> n4 The Commission also stated that determinations such as the one at issue reflect the policy of the PSC. The Commission cited Administrative Case No. 382, An Inquiry Into the Development of Deaveraged Rates for Unbundled Network Elements, Order dated December 18, 2001 at 36 which states, "The Commission also makes clear in this Order that ordinarily combined UNEs must also be made available where line-splitting occurs. Line-splitting must be made available to all CLECs on a nondiscriminatory basis. Moreover, BellSouth may not discontinue the provision of line-splitting when a CLEC provides voice service through UNE-P, regardless of which xDSL provider is used." BellSouth did not contest this Commission ruling.

[*15]

B. Whether the PSC's Order is Preempted

BellSouth argues that PSC's Order must fail because of federal preemption, stating that, "as a matter of federal law, the Federal Communications Commission ("FCC") - not state commissions - has exclusive jurisdiction over interstate communications." Cinergy counters that this is an oversimplification that results in a flawed characterization of the current law.

BellSouth maintains that DSL service, as used to provide Internet access, is an interstate service subject to the FCC's jurisdiction. Cinergy, on the other hand, states that since 1996, responsibility for increasing competition in the realm of telecommunications services, including those with an interstate dimension, has become the responsibility of both federal and state legislatures. Cinergy points to the concept of "cooperative federalism," and states that the Sixth Circuit has described this concept as "harmonizing" the efforts of federal and state agencies. *Michigan Bell Telephone Company v. MCIMetro Access Transmission Services, Inc., 323 F.3d 348, 352 (6th Cir. 2003).*

[HN9] The Supreme Court has recognized that the Act cannot divide the world of domestic telephone **[*16]** service "neatly into two hemispheres," one consisting of interstate service, over which the FCC has plenary authority, and the other consisting of intrastate service, over which the states retain exclusive jurisdiction. *Louisiana Pub. Serc. Comm'n v. FCC, 476 U.S. 355, 360, 90 L. Ed. 2d 369, 106 S. Ct. 1890 (1986); see also Southwestern Bell Tel. Co. v. Pub. Util. Commn of Texas, 208 F.3d 475, 480 (5th Cir. 2000).* Rather, observed the Court, "the realities of technology and economics belie such a clean parceling of responsibility." *Id.* The FCC has also rejected the argument advanced by BellSouth, noting that "state commission authority over interconnection agreements pursuant to *Section 252* extends to both interstate and intrastate matters." Reciprocal Compensation Ruling P25, quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 F.C.C.R. 15499 P84, 1996 WL 452885 (1996).*

In its Order, the PSC concluded that it did in fact have jurisdiction over this issue and that the FCC determinations were not preemptive:

> We also have jurisdiction over the issue of whether BellSouth **[*17]** acts reasonably in refusing to provide DSL service to CLEC UNE-P customers under, inter alia, *47 U.S.C. § 252(e)* and *K.R.S. 278.280.* The FCC's determination on this issue is not, and does not purport to be, preemptive.

July 12, Order at 2.

[HN10] State laws can be expressly or impliedly preempted by federal law. *Michigan Bell Tel. Co., 323 F.3d at 358.* Federal law may preempt state law when federal statutory provisions or objectives would be frustrated by the application of state law. *Id.* Moreover, where Congress intends for federal law to govern an entire field, federal law preempts all state law in that field. *Id.* The Sixth Circuit has held that when a state law is not expressly preempted, courts must begin with the presumption that the law is valid. *Springston v. CONRAIL, 130 F.3d 241, 244 (6th Cir. 1997).* "'It will not be presumed that a federal statute was intended to supersede the exercise of power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly presumed.'" *Id.* (quoting *New York State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405, 415, 37 L. Ed. 2d 688, 93 S. Ct. 2507 (1973).* **[*18]**

[HN11] When Congress enacted the Telecommunications Act of 1996, it did not expressly preempt state regulation of interconnection. *Michigan Bell, 323 F.3d at 358.* In fact, it expressly preserved existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition. *Id.* Specifically, *Section 251(d)(3) of the Act* states that the Federal Communications Commission shall not preclude enforcement of state regulations that establish interconnection and are consistent with the Act. *47 U.S.C. § 251(d)(3).*

[HN12] The Act permits a great deal of state commission involvement in the new regime it sets up for the operation of local telecommunications markets, "as long as state commission regulations are consistent with the Act." *Michigan Bell Tel. Co., 323 F.3d at 359* (citing *Verizon North, Inc., v. Strand, 309 F.3d 935 (6th Cir. 2002))*. "Congress has made clear that the States are not ousted from playing a role in the development of competitive telecommunications markets...however, Congress did not intend to permit state regulations **[*19]** that conflicted with the 1996 Act...Thus, a state may not impose any requirement that is contrary to terms of *sections 251 though 261* or that "stands as an obstacle to the accomplishment and execution of the full objectives of Congress." *Michigan Bell Tel. Co., 323 F.3d at 359* (quoting *In re Public Utility Commission of Texas, 13 F.C.C.R. 3460, P52 (1997)* (internal citations omitted). According to the FCC, as long as state regulations do not prevent a carrier from taking advantage of *sections 251 and 252* of the Act, state regulations are not preempted. *Id.* (citing *In re Public Utility Commission of Texas, 13 F.C.C.R. 3460, P50-52)*. The Court finds that nothing in the state regulations stand as an obstacle to the accomplishment and execution of the full objectives of Congress.

[HN13] The 1996 Act incorporated the concept of "cooperative federalism," whereby federal and state agencies "harmonize" their efforts and federal courts oversee this "partnership." *Michigan Bell, 323 F.3d at 352*. Quite clearly, the 1996 Act makes room for state regulations, orders and requirements of state commissions as long as they do **[*20]** not "substantially prevent" implementation of federal statutory requirements. The PSC's order, challenged here by BellSouth, embodies just such a requirement. *47 U.S.C. § 251(d)(3)(C)*. It establishes a relatively modest interconnection-related condition for a local exchange carrier so as to ameliorate a chilling effect on competition for local telecommunications regulated by the Commission. The PSC order does not substantially prevent implementation of federal statutory requirements and thus, it is the Court's determination that there is no federal preemption.

C. Whether the PSC's decision is arbitrary and capricious.

Aside from BellSouth's other arguments, the company alleges that the PSC's decision is arbitrary and capricious in that it is unsupported by substantial evidence in the record as a whole. BellSouth contends that the Commission lacked any support for its conclusion that BellSouth's policy of refusing to provide DSL service on CLEC UNE-P lines has a "chilling effect on competition."

The Kentucky PSC determined that it would consider "whether BellSouth acts reasonably in refusing to provide DSL service to competitive carrier UNE-P **[*21]** customers under, inter alia, *47 U.S.C. § 252 (e)* [which preserves state law] and *KRS § 278.280*." July, 12, 2002 Order at 2. Kentucky law provides:

> [HN14] Whenever the commission...finds that the rules, regulations, practices, equipment, appliances, facilities or service of any utility subject to its jurisdiction... are unjust [or] unreasonable,... the commission shall determine the just [or] reasonable...practices,... service or methods to be observed,...and shall fix the same by its order, rule or regulation.

KRS § 278.280(1). The PSC determined that BellSouth violated the above statute because its "practice of tying its DSL service to its own voice service to increase its already considerable market power in the voice market has a chilling effect on competition and limits the prerogative of Kentucky customers to choose their own telecommunications carriers." July 12, 2002 Order at 7.

By claiming that the PSC's findings lack any support in the record, BellSouth vastly understates the administrative record. Cinergy offered voluminous testimony describing BellSouth's anticompetitive practices and explaining how they would cripple Cinergy's **[*22]** ability to compete in the local voice market. For instance, prior to this arbitration, the PSC entered an advisory opinion stemming from a separate investigation of BellSouth's policies and found such policies to have a chilling effect on competition:

> BellSouth is aggressively offering customers bundled voice and advanced services while, according to AT&T, BellSouth consistently precludes CLECs who use the unbundled network element platform (UNE-P) from offering customers this same option. This has the effect of chilling local competition for advanced services.

Kentucky 271 Advisory Opinion, pp. 13-14. Cinergy also presented multiple witness to testify regarding BellSouth's policy's effect on competition.

The PSC's decision is supported by a reasoned explanation and is based upon the evidence in the record as a whole. Consequently, the Court sees nothing that points to the PSC's decision being arbitrary or capricious. Therefore, because the PSC's decision seems to be the

result of a deliberate principled reasoning process, and is supported by substantial evidence, the Court finds that the decision of the state commission should stand.

Accordingly,

IT IS ORDERED, **[*23]** that the PSC's decision be, and the same hereby is, AFFIRMED.

This the 29th day of December, 2003.

Signed By:

Joseph M. Hood

United States District Judge

EXHIBIT B

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

SECOND REPORT AND ORDER

Adopted: November 2, 1999 **Released:** November 9, 1999

By the Commission:

I. Introduction

1 One of the fundamental goals of the Telecommunications Act of 1996 (1996 Act)[1] is to promote innovation and investment by all participants in the telecommunications marketplace, in order to stimulate competition for all services, including advanced services.[2] In this order, we take another important step towards implementing Congress' goals with respect to advanced services.[3]

---

[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified at* 47 U.S.C. §§ 151 *et seq.* Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code. The 1996 Act amended the Communications Act of 1934. We refer to the Communications Act of 1934, as amended, as the "Communications Act" or as the "Act."

[2] Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong. 2d Sess. 1 (1996) (*Joint Explanatory Statement*). For purposes of this order, we use the term "advanced services" to mean high speed, switched, broadband, wireline telecommunications capability that enables users to originate and receive high-quality voice, data, graphics or video telecommunications using any technology. The term "broadband" is generally used to convey sufficient capacity -- or "bandwidth" -- to transport large amounts of information. As technology evolves, the concept of "broadband" will evolve with it: we may consider today's "broadband" services to be "narrowband" services when tomorrow's technologies appear. Today's broadband services include services based on digital subscriber line technology (commonly referred to as xDSL), including ADSL (asymmetric digital subscriber line), HDSL (high-speed digital subscriber line), UDSL (universal digital subscriber line), VDSL (very-high speed digital subscriber line), and RADSL (rate-adaptive digital subscriber line), and services based on packet-switched technology.

[3] Although advanced services can also be deployed using other technologies over satellite, cable, and wireless systems, the issues raised in this docket are limited to wireline services. We use the term "wireline" in this order to refer to facilities that have traditionally been deployed by telephone companies. This is distinct from the coaxial and other cable facilities that have traditionally been deployed by cable companies.

20 We are confident that our findings reinforce the resale requirement of the Act by ensuring that resellers are able to acquire advanced services sold by incumbent LECs to residential and business end-users at wholesale rates, thus ensuring that competitive carriers are able to enter the advanced services market by providing to consumers the same quality service offerings provided by incumbent LECs. Moreover, we expect that our conclusions will stimulate the development and deployment of broadband services to residential markets in furtherance of the Commission's mandate to encourage the deployment of advanced telecommunications capability to all Americans.[42] We believe that our conclusions will encourage incumbents to offer advanced services to Internet Service Providers at the lowest possible price. In turn, the Internet Service Providers, as unregulated information service providers, will be able to package the DSL service with their Internet service to offer affordable, high-speed access to the Internet to residential and business consumers. As a result, consumers will ultimately benefit through lower prices and greater and more expeditious access to innovative, diverse broadband applications by multiple providers of advanced services. We note that our conclusions herein do not change the regulatory status of the Internet Service Provider, which we have previously concluded to be an information service provider rather than a telecommunications carrier.[43] We believe that maintaining the non-carrier status of Internet Service Providers, in this instance, benefits the public interest.[44]

21 Moreover, we agree with NTIA that although bulk DSL services sold to Internet Service Providers are not retail services subject to section 251(c)(4), these services are telecommunications services, and as such, incumbent LECs must continue to comply with their basic common carrier obligations with respect to these services. These obligations include: providing such DSL services upon reasonable request; on just, reasonable, and nondiscriminatory terms; and in accordance with all applicable tariffing requirements.[45]

[42] *See* 47 U.S.C. § 157.

[43] *See Report to Congress on Universal Service*, 13 FCC Rcd at 11529, para 58 (finding that "[a]n offering that constitutes a single service from the end user's standpoint is not subject to carrier regulation simply by virtue of the fact that it involves telecommunications components").

[44] Letter from Susanne Guyer, Assistant Vice President Federal Regulatory, Bell Atlantic, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 98-147, at 1 (filed June 26, 1999) (Bell Atlantic June 26 *Ex Parte*). This conclusion does not affect the incumbent LECs' universal service contribution requirements. Incumbent LECs must base their contributions on end-user telecommunications revenues, which generally include revenues derived from Internet Service Providers. *See 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Services, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms*, Report and Order, Commission 99-175, CC Docket No. 98-171, at n.127 (rel. July 14, 1999). Bulk sales of DSL services to Internet Service Providers are included in this requirement.

[45] NTIA May 7 *Ex Parte*. NTIA also argues that the incumbent LECs must show that the DSL rates that they charge to their Internet Service Provider customers, including any volume and term discounts, cover all relevant costs of providing service, including a reasonable share of the costs of the underlying subscriber loop. We do not address in this order the issue of proper allocation of loop costs.

EXHIBIT C

TELEPHONY ONLINE
A PRIMEDIA Publication

BellSouth posts 37% profit increase in Q4

By Kevin Fitchard

TelephonyOnline.com, Jan 22 2004

Despite the continued drain from line losses, BellSouth today posted a 37% increase in 4th quarter profits off of revenues from bundling, long-distance and DSL sales as well as its chunk of Cingular's earnings.

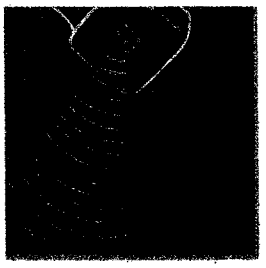
The carrier reported $787 million in net income off of $5.74 billion in revenue for the last three months of 2003. In 2002, Q4 income was $574 million, but revenues have remained flat year after year, as the carrier posted less than a 1% gain from the $5.69 billion it took in Q4 of 2002. Profits for the entire year added up to $3.9 billion, a staggering increase over 2002, in which BellSouth posted a $1.32 billion loss after facing a year of severe line losses and a depressed economy. Like its quarterly revenues, BellSouth's yearly revenues remained flat, at $22.6 billion

BellSouth CFO Ron Dykes said BellSouth was successful this year in pushing new higher margin revenue streams to account for its mounting line losses. BellSouth's total lines fell to 23.7 million a 3.6% decrease compared to the end of 2002. But the carrier added more than 126,000 DSL customers in the fourth quarter, bringing its total to 1.46 million. In addition, the carrier more than quadrupled its long-distance customers in 2003, ending the year with 3.96 million customers bundling local and long-distance services.

Dykes added that BellSouth's bundling program has now reached 24% of BellSouth's primary access lines, generating average monthly revenues of $62 per customer. Overall ARPU for wireline customers steadily increased through the year, boosted by Internet and long-distance subscribers. "We expect ARPU to continue to grow as we add additional long-distance and DSL revenue," Dykes said.

BellSouth also began its rollout of DirecTV in the first quarter, and Dykes said the satellite programming service will be available in BellSouth's bundle offers by second quarter.

EXHIBIT D



POTS becomes old school

BY KIRK LAUGHLIN

What's stoic, reliable and about to endure an unprecedented thrashing during the course of 2004?

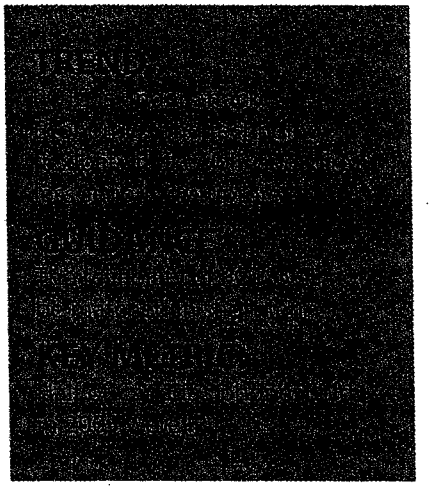
The answer of course is plain-old-telephone-service (POTS), the long-standing bedrock of worldwide telephony communication that, in the face of formidable adversaries, is beginning to quake underfoot.

The demise of POTS has long been predicted, yet its performance under fire (and blizzards and floods) sets a standard that disruptive challengers will still have a hard time matching. While VoIP is crusading to undermine POTS, wireless telephony has already been on the job for several years. Traditional telcos have been wearily observing mobile operators chew away at their core access line business, putting a hard limit on the expansion of POTS.

The loss of access lines is only a part of the fracturing. Volume across traditional telco infrastructure is down and, as a result, carriers are watching revenues decline because less traffic means less tariffs. Linking the decline of POTS with the decline of telcos is, however, a common mischaracterization. RBOCs and IXCs are in the mobile game, and are increasingly into VoIP. They are so far steering clear of WLANs, another nascent riser that could produce more destabilization for POTS in the enterprise.

Clearly 2004 is shaping up as the year that VoIP begins to really rock the foundation of POTS, primarily because top-tier carriers across North America are backing the technology, which is a significant shift from the way things were only one year ago.

"We believe 2004 will be the breakout year for VoIP. The technology is rapidly moving out of the network core to the network edge," Vik Grover, an analyst with Needham and Company, reported in a brief recently. "The marriage of VoIP edge devices and applications to broadband pipes sold to an increasingly mobile workforce obsoletes legacy voice models."



VoIP thrives because of economics. Yet, doubts about its scalability and robustness have hounded the technology since its early ascendancy. Canada's Telus, for example, road tested its IP network for nearly a year by routing all corporate traffic on the network.

Satisfied with its performance, Telus unveiled its IP-One network last November to enterprises. "IP-One is the fruit of two years of collaboration — it's been an evolution," says Lui Fogolini, vice president of service provider operations at Cisco Systems Canada. "We're truly treating voice as data and providing the required QoS."

In 2002, 36% of telephone systems sold in Canada were IP-based. That figure was expected to rise to 48% by the end of 2003.

The rise of VoIP also upsets POTS in a way that is still hard to fathom. Because of the rich feature set of IP telephony, users, not providers, will dictate the shape of the IP revolution based on new habits and usage patterns. Analysts predict an environment where users have greater control of communication services, due largely to the dozens of new features embedded in IP systems. For instance, users can review received calls on a computer screen instead of listening to voice mail. They may also exercise an all-call that enables the network to initiate simultaneous calls to different numbers owned by the same individual.

SBC's recently announced hosted IP service includes a "find me, follow me" feature, which permits enterprise workers to forward calls to designated numbers, such as a mobile number or satellite office. The service is currently available in 18 metro areas.

Mobile telephony is becoming the de-facto communication service standard for the younger generation. Reports continue to show that younger people have less loyalty to landline.

Although barely perceptible now, one sure-hit trend for 2004 is the twin utilization of VoIP and mobile communications by single households. Although neither individually has the track record or reliability of POTS, together they are more formidable, offer more flexibility, and quite likely are more economic than the stand-alone legacy option.

Broadband changes the way the game is played

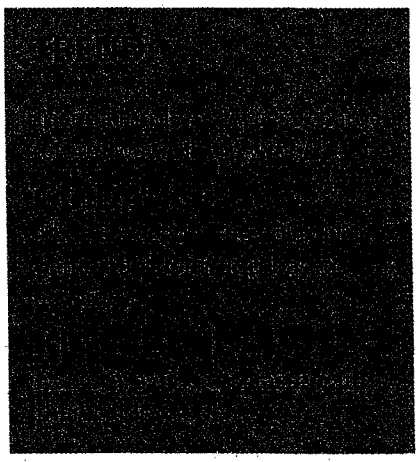
By Shira Levine

If 2003 was the year of broadband indecision, as the telecom industry waited with bated breath for the ederal Communications ommission's final triennial review rder, industry experts predict that 004 will be the year of the broadband old rush as incumbents leverage their egulatory freedom and build out their dvanced fiber networks.

"I see carriers moving forward aggressively with FTTP initiatives," says Andy elt, senior fellow at consultancy dventis. "There are challenges with the conomics, but I think that there is nough stability in the regulatory outook and they won't have to make their ew infrastructure available to others."

In its triennial review order, released 1 August, the FCC ruled that all new uildouts — both fiber and hybrid ber/copper — are exempt from nbundling requirements, as are packet witches, including routers and SLAMs. The commission also hased out line sharing for new customers over three years, although it emporarily grandfathered all existing ne sharing arrangements. Add to that ie FCC's pending rulemaking on how SL should be regulated — and its tentative conclusion" that the RBOCs ould no longer be required to comply ith open access requirements—and ie result is a broadband environment escribed by many as decidedly nfriendly to competitive carriers.

As a result, Dana Frix, co-chair of hadbourne & Parke telecommunicaons and technology practice, predicts iat competitive carriers will focus their efforts this year on applications, not infrastructure. "Competitive carriers don't have access to the network in terms and conditions and rates that are available for a period of time, and development of infrastructure does not make sense to them right now, especially in a capital-starved market," Frix says. "They're going to be investing in things closest to the consumer, which are the applications."



Meanwhile, industry observers expect incumbent telcos to continue competing with cable operators, both on price and, increasingly, on service. RHK reports 9.1 million DSL subscribers, compared to 14.5 million cable modem subscribers, but DSL is growing at a faster rate than cable — 10% quarter-over-quarter, versus 7% for cable. As cable operators start to roll out their VoIP offerings, as Time Warner recently announced it will do this year, telcos will begin to push DSL more aggressively.

"So far, cable has taken revenue from DSL, not from voice, so it hasn't been a threat," says Armando Geday, president and CEO of GlobespanVirata. "As the cable operators start deploying VoIP, and the threat becomes more real, the ILECs will be motivated to start deploying DSL faster."

Belt believes that DSL providers will expand their portfolio of services in 2004 to include more value-added content and features such as home networking, working with third-party content providers and forging relationships such as the SBC/Yahoo partnership. "Over this next year, the DSL guys will need to become more innovative in the types of offers they provide," he says. "What DSL providers need to do to move penetration to the next level is deliver more content, such as music and video."

As always, however, regulatory activity has the potential to throw a wrench in even the most well thought-out predictions. Last spring, the FCC issued a notice of inquiry on broadband power line technology, which could prove to be a viable way for a third broadband competitor to enter the residential market. And many industry members believe that the need for access charge reform will push the commission into making a decision on VoIP regulation in 2004, which could have a ripple effect on broadband deployment.

"Strong political forces have kept the regulation of Internet traffic and Internet commerce very light, but as VoIP gets going, it will begin to take a large bite out of voice revenues, and therefore, out of economies of a number of powerful constituencies," Belt says.

EXHIBIT E

Cinergy Communications Company
8829 Bond Street
Overland Park, KS 66214
phone 913.492.1230
fax 913.492.1684

December 16, 2003

CINERGY. COMMUNICATIONS

Ms. Nicole Bracy
BellSouth Interconnection Services
675 West Peachtree St., NE
Room 34S91
Atlanta, GA 30375

Re: Change of Law

Dear Nicole:

This follows our telephone conversation of December 12, 2003 regarding BellSouth's proposed amendment. Please be advised that your proposal is unacceptable for the following reasons.

1. Any change to the interconnection agreement must be based upon a change of law. In your letter of November 21, 2003, you admit that the proposed changes are not limited to those arising out of change of law. Your proposed amendment also contains alleged "service enhancements" as well as "addresses other issues important to BellSouth and Cinergy."

2. The proposed amendment was not a redlined version of our current agreement. Based upon past experience, Cinergy Communications must insist on a redlined version so that we can address each change of law individually.

3. BellSouth did not include an explanation of why the change was necessary or even cite to the TRO for support of the change.

4. Cinergy Communications disputes the concept of Market Based Rates. Once a UNE is delisted, 271 elements are to be provided at "just and reasonable" rates which we believe must be set by a commission. BellSouth's proposed rates are improper and we will not voluntarily agree to them.

5. BellSouth did not even consider our request for commingling of UNE-P and wholesale DSL transport. Instead, I received a half-baked argument from Annamarie Lemoine related to line sharing. As I indicated in our call, this is not a line sharing issue. With UNE-P we have access to the entire loop which is not line sharing. We then want to commingle DSL transport, an access service found in BellSouth's FCC Access Tariff, with UNE-P. Annamarie admitted in our conversation that she was not even familiar

with the FCC tariff and the manner in which DSL transport was offered. This is unacceptable and does not constitute good faith.

In fact, BellSouth has now included the FCC's commingling language in its Access Tariff (See Section 2.2.3 attached). The commingling language applies to all access services in the tariff, including wholesale DSL transport:

> ...telecommunication carriers who obtain unbundled network elements (UNEs) or combinations of UNEs . . . pursuant to an interconnection agreement with the Telephone Company, man connect, combine, or otherwise attach such UNEs or combinations of UNEs to Access services purchased under this tariff except to the extent such agreement explicitly:
>
> (1) prohibits such commingling; or
>
> (2) requires the parties to complete the procedures set forth in the agreement regarding change of law prior to implementing such commingling

DSL transport is an access service which Cinergy Communications can purchase out of the Access tariff at issue. The only thing preventing Cinergy Communications from doing so is negotiating the change in law provisions into the interconnection agreement as required by this tariff.

Unfortunately, BellSouth's contract negotiators are unaware of this language in the BellSouth tariff. It would seem to me that including this language in the agreement is a mere formality. Cinergy Communications has indicated that the language contained in the Kentucky agreement would be acceptable in order to fulfill the commingling requirement. We believe that the Kentucky language amounts to commingling and the parties have proved that they can operate in this fashion with little or no complaint.

This is to again request that BellSouth reconsider negotiating commingling language based upon our Kentucky agreement. The FCC has clearly stated that a failure to allow commingling "would constitute an 'unjust and unreasonable practice' under 201 of the Act, as well as an 'undue and unreasonable prejudice or advantage' under section 202 of the Act. (See paragraph 581 of TRO). The FCC noted that failure to comply will result in specific penalties of $7,600 per offense and $330 for each day of the continuing offense. (footnote 1792 of TRO).

Very truly yours,

Robert A. Bye
Vice President and
General Counsel

Enclosures

cc: John P. Cinelli, President Cinergy Communications
Jerry Hendrix

BELLSOUTH TELECOMMUNICATIONS, INC.
BY: Operations Manager - Pricing
29G57, 675 W. Peachtree St., N.E.
Atlanta, Georgia 30375
ISSUED: OCTOBER 2, 2003

TARIFF F.C.C. NO. 1
1ST REVISED PAGE 2-9
CANCELS ORIGINAL PAGE 2-9

EFFECTIVE: OCTOBER 17, 2003

ACCESS SERVICE

2 - General Regulations (Cont'd)

2.2 Use (Cont'd)

2.2.1 Interference or Impairment (Cont'd)

(B) Except as provided for equipment or systems subject to the F.C.C. Part 68 Rules in 47 C.F.R. Section 68.108, if such characteristics or methods of operation are not in accordance with (A) preceding, the Telephone Company will, where practicable, notify the customer that temporary discontinuance of the use of a service may be required; however, where prior notice is not practicable, nothing contained herein shall be deemed to preclude the Telephone Company's right to temporarily discontinue forthwith the use of a service if such action is reasonable under the circumstances. In case of such temporary discontinuance, the customer will be promptly notified and afforded the opportunity to correct the condition which gave rise to the temporary discontinuance. During such period of temporary discontinuance, credit allowance for service interruptions as set forth in 2.4.4(A) and (B) following is not applicable.

2.2.2 Unlawful Use

The service provided under this tariff shall not be used for an unlawful purpose.

2.2.3 Commingling (N)

(A) Except as provided in Section 51.318 of the Federal Communications Commission's rules, telecommunications carriers who obtain unbundled network elements (UNEs) or combinations of UNEs pursuant to a Statement of Generally Available Terms, under Section 252 of the Act, or pursuant to an interconnection agreement with the Telephone Company, may connect, combine, or otherwise attach such UNEs or combinations of UNEs to Access services purchased under this Tariff except to the extent such agreement explicitly: (N)

(1) prohibits such commingling; or (N)

(2) requires the parties to complete the procedures set forth in the agreement regarding change of law prior to implementing such commingling. (N)

(B) The rates, terms, and conditions of this Tariff will apply to the Access Services that are commingled. (N)

(C) UNEs or combinations of UNEs that are commingled with Access Services are not included in the shared use provisions of this Tariff. (N)

(M)

Certain material previously appearing on this page now appears on Original Page 2-9.1.

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BELLSOUTH TELECOMMUNICATIONS, INC.
BY: Operations Manager - Pricing
29G57, 675 W. Peachtree St., N.E.
Atlanta, Georgia 30375
ISSUED: OCTOBER 2, 2003

TARIFF F.C.C. NO. 1
ORIGINAL PAGE 2-9.1

EFFECTIVE: OCTOBER 17, 2003

ACCESS SERVICE

2 - General Regulations (Cont'd) (N)

2.3 Obligations of the Customer (M)

2.3.1 Damages (M)

The customer shall reimburse the Telephone Company for damages to Telephone Company facilities utilized to provide services under this tariff caused by the negligence or willful act of the customer, or resulting from the customer's improper use of the Telephone Company facilities, or due to malfunction of any facilities or equipment provided by other than the Telephone Company. Nothing in the foregoing provision shall be interpreted to hold one customer liable for another customer's actions. The Telephone Company will, upon reimbursement for damages, cooperate with the customer in prosecuting a claim against the person causing such damage and the customer shall be subrogated to the right of recovery by the Telephone Company for the damages to the extent of such payment. (M)

Certain material now appearing on this page previously appeared on Original Page 2-9.

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BELLSOUTH TELECOMMUNICATIONS, INC.
BY: Operations Manager - Pricing
29G57, 675 W. Peachtree St., N.E.
Atlanta, Georgia 30375
ISSUED: OCTOBER 2, 2003

TARIFF F.C.C. NO. 1
9TH REVISED PAGE 2-54.1
CANCELS 8TH REVISED PAGE 2-54.1

EFFECTIVE: OCTOBER 17, 2003

ACCESS SERVICE

2 - General Regulations (Cont'd)

2.6 Definitions (Cont'd)

Collocator - BellSouth Virtual Expanded Interconnection Service

The term "Collocator-BellSouth Virtual Expanded Interconnection Service" denotes any person, corporation, or other legal entity with whom the Telephone Company has negotiated for the purpose of provisioning an interconnection arrangement in accordance with the BellSouth Virtual Expanded Interconnection tariff provisions.

Collocator's Facilities - BellSouth Virtual Expanded Interconnection Service

The term "Collocator's Facilities-BellSouth Virtual Expanded Interconnection service" denotes the collocator-provided/Telephone Company leased fiber optic cables and central office terminating equipment installed and maintained by the Telephone Company for the sole use of provisioning a BellSouth Virtual Expanded Interconnection service arrangement, in accordance with the BellSouth Virtual Expanded Interconnection tariff provisions.

Common Line

The term "Common Line" denotes a line, trunk, pay telephone line or other facility provided under the general and/or local exchange service tariffs of the Telephone Company, terminated on a central office switch. A common line-residence is a line or trunk provided under the residence regulations of the general and/or local exchange service tariffs. A common line-business is a line provided under the business regulations of the general and/or local exchange service tariffs.

Commingling (N)

The term "Commingling" means the connecting, attaching, or otherwise linking of an unbundled network element (UNE), or a combination of unbundled network elements (UNEs), to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, or the combining of an UNE, or a combination of UNEs, with one or more such facilities or services. (N)

****

BELLSOUTH TELECOMMUNICATIONS, INC.
BY: Operations Manager - Pricing
29G57, 675 W. Peachtree St., N.E.
Atlanta, Georgia 30375
ISSUED: OCTOBER 2, 2003

TARIFF F.C.C. NO. 1
5TH REVISED PAGE 2-72
CANCELS 4TH REVISED PAGE 2-72

EFFECTIVE: OCTOBER 17, 2003

ACCESS SERVICE

2 - General Regulations (Cont'd)

2.6 Definitions (Cont'd)

Transmission Measuring (105 Type) Test Line/Responder

The term "Transmission Measuring (105 Type) Test Line/Responder" denotes an arrangement in an end office which provides far-end access to a responder and permits two-way loss and noise measurements to be made on trunks from a near end office.

Transmission Path

The term "Transmission Path" denotes an electrical path capable of transmitting signals within the range of the service offering, e.g., a voice grade transmission path is capable of transmitting voice frequencies within the approximate range of 300 to 3000 Hz. A transmission path is comprised of physical or derived channels consisting of any form or configuration of facilities typically used in the telecommunications industry.

Trunk

The term "Trunk" denotes a communications path connecting two switching systems in a network, used in the establishment of an end-to-end connection.

Trunk Group

The term "Trunk Group" denotes a set of trunks which are traffic engineered as a unit for the establishment of connections between switching systems in which all of the communications paths are interchangeable.

Trunk-Side Connection

The term "Trunk-Side Connection" denotes the connection of a transmission path to the trunk side of a local exchange switching system.

Two-Wire to Four-Wire Conversion

The term "Two-Wire to Four-Wire Conversion" denotes an arrangement which converts a four-wire transmission path to a two-wire transmission path to allow a four-wire facility to terminate in a two-wire entity (e.g., a central office switch).

Unbundled Network Elements (UNEs) (N)

The term "Unbundled Network Elements" denotes the physical facilities of the network, including the associated features, functions and capabilities, that are capable of being used in the provision of a telecommunications service, made available pursuant to Section 251 of the Telecommunications Act of 1996. (N)

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ACCESS SERVICE

7 - Special Access (a.k.a. BellSouth SPA) Service (Cont'd)

7.4 Rate Regulations (Cont'd)

7.4.29 BellSouth ADSL Service

(A) Monthly rates and nonrecurring charges apply as specified following, and reflect the cost of providing BellSouth ADSL service to the customer, but do not reflect any additional incremental cost associated with providing service to customers of a NSP. The minimum quantity of BellSouth ADSL service VCs specified in 7.2.17(C)(1) and (2) is 51. The minimum quantity of BellSouth ADSL service VCs specified in 7.2.17(C)(3) through (7) is 1. (C)

Nonrecurring charges are one-time charges that apply for a specific work activity. Nonrecurring charges that apply for BellSouth ADSL service are associated with installation of service, moves of service, service rearrangements and termination liability. These charges are as specified in F through I and 7.5.21 following. (N)

Beginning October 1, 2001, and ending December 31, 2001, the Telephone Company will credit 50% of the VC Nonrecurring Charge for customers who subscribe to a BellSouth ADSL service, High Speed Asymmetric and Symmetric VC having a customer-specified commitment equal to or greater than 13 months. The nonrecurring charge credit will appear as a bill credit upon completion of the 13th consecutive month of service. In order to take advantage of this nonrecurring charge credit, requests for service must be placed between October 1, 2001 and December 31, 2001, with order completion within 30 days of the order application date. The order application date is the date the customer requests service and has provided all information necessary to complete the order, as determined by the Company, pursuant to tariff. If the VC is disconnected at customer request prior to completion of 13 consecutive months service, the credit will not apply. If the VC is disconnected at customer request after completion of 13 consecutive months service, any applicable termination liability charges will be assessed pursuant to tariff. (N)

Monthly rates are recurring charges that apply each month, or fraction thereof, that a service is provided. For billing purposes, each month is considered to have 30 days. (N)

(M)

Certain material previously appearing on this page now appears on 6th Revised Page 7-103.24

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ACCESS SERVICE

7 - Special Access (a.k.a. BellSouth SPA) Service (Cont'd)

7.4 Rate Regulations (Cont'd)

7.4.29 BellSouth ADSL Service (Cont'd)

(B) A monthly recurring rate will be billed to the customer for each BellSouth ADSL service VC established to an end-user premises. The monthly rate for data rate options specified in 7.2.17(C)(1) and (2) will be as specified in 7.5.21(A)(1) and (2). The monthly rate for data rate options specified in 7.2.17(C)(3) through (7) will be determined by the commitment period designated by the customer beginning with establishment of the customer account. (M)

In addition to month-to-month (MTM) rates, customer-selected commitment periods of from 13 to 24 months, and 25 months or greater, are available for data rate options specified in 7.2.17(C)(3) through (7). When the customer requests these data rate options, the customer must designate to the Telephone Company the commitment and optional commitment period desired, e.g. a commitment of 20 months and a 13 to 24 month commitment period. (M)

Rates stabilized under customer-selected commitment periods of from 13 to 24 months, and 25 months or greater, are exempt from Telephone Company-initiated increases. However, decreases will flow through to the customer. In the event that a VC is disconnected at customer request prior to completion of a customer-selected commitment period in excess of 12 months, the customer will be required to pay a termination charge as specified in (G) following. The customer-designated commitment and commitment period may not be reduced, however, renewals of the existing VC and data rate, at the same end-user premises are allowed at rates and terms and conditions appropriate for new service. The VC nonrecurring charges are not applicable for the renewed services. (M)

Subsequent to the establishment of a customer-selected commitment period longer than 12 months, and prior to completion of that period, the existing commitment and commitment period may be replaced by a currently offered commitment and commitment period having a length equal to or longer than the time remaining in the existing arrangement. The appropriate rates will be as if for new service. Nonrecurring charges will not be re-applied for these renewals, and no credit will be provided for payments made during the formerly selected period. Changes to a commitment or commitment period with a length shorter than the existing arrangement will result in application of termination liability charges as specified in G. following. Recognition of previous service will not be a factor in determination of rates appropriate for a renewed arrangement. (M)

Certain material now appearing on this page previously appeared on 5th Revised Page 7-103.23

Certain material previously appearing on this page now appears on 2nd Revised Page 7-103.24.0.1

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7.4 Rate Regulations (Cont'd)

7.4.29 BellSouth ADSL Service (Cont'd)

(C) For customer-selected VC data rates specified in 7.2.17(C)(1) and (2), existing customers of record as of May 28, 2001 will be allowed 180 days, and new or future customers beginning on/after May 29, 2001 will be allowed an initial period of 180 days beginning with establishment of the first billing account, to attain a combined quantity of VCs at data rates specified in 7.2.17(C)(1) and (2) that is equal to or greater than the minimum number of VCs as specified in 7.4.29(A) on billing accounts across the region. During this initial 180-day period, customers will be billed an amount equal to the number of VCs on their billing accounts across the region multiplied by the appropriate VC monthly recurring rate. (M)

Upon completion of the 180-day period, a monthly review will be conducted of quantities of VCs specified in 7.2.17(C)(1) and (2) that are associated with each customer's billing accounts across the region. Each month, a customer account not meeting the minimum quantity of VCs specified in 7.4.29(A) will be charged an amount equal to the difference between the minimum quantity of VCs as specified in 7.4.29(A) and the customer's combined quantity of VCs at data rates specified in 7.2.17(C)(1) and (2), multiplied by the rate specified in 7.5.21(A)(1)(a). This charge is in addition to the normal monthly rates equal to the number of VCs actually attained on their billing accounts across the region, multiplied by the appropriate VC monthly recurring rate. (M)

Material now appearing on this page previously appeared on 5th Revised Page 7-103.24

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ACCESS SERVICE

7 - Special Access (a.k.a. BellSouth SPA) Service (Cont'd)

7.4 Rate Regulations (Cont'd)

7.4.29 BellSouth ADSL Service (Cont'd)

(F) A move charge applies for each BellSouth ADSL service VC moved to an end-user's new premises as designated by the customer. This charge is equal to the sum of all the nonrecurring charges applicable for a new installation of BellSouth ADSL service. (T)

If BellSouth ADSL service is available at the end-user's new premises as designated by the customer, no Termination Liability Charge is applicable when the service orders to install a BellSouth ADSL service VC at the end-user's new premises and disconnect a BellSouth ADSL service VC at the end-user's old premises are for the same end-user, both orders are related together, and there is no lapse in service between installation and disconnection of a BellSouth ADSL service VC. (T)

If BellSouth ADSL service is not available at the end-user's new premises as designated by the customer, the move request will be treated as a discontinuance of service at the old premises and the customer will remain responsible for satisfying minimum period obligations. If appropriate, a Termination Liability Charge as specified in (G) following will apply. (T)

(G) A Termination Liability Charge (TLC) is applicable for VCs at data rates specified in 7.2.17(C)(1) through (7), on a per end-user basis, that are disconnected prior to completion of the appropriate minimum service period as specified in 7.4.4 preceding. (T)(C)(T)(C)

The TLC for VC data rates specified in 7.2.17(C)(1) and (2) is: (N)

Tariff Reference	VC Data Rate	Charge
7.2.17(C)(1)	256 Kbps x 1.5 Mbps	$ 50.00
7.2.17(C)(2)	512 Kbps x 768 Kbps	$200.00

(T)

For VCs at data rates specified in 7.2.17(C)(3) through (7) that are provided on a month-to-month basis and have a customer-designated commitment of 12 months or less, but are disconnected prior to completion of the minimum service period specified in 7.4.4 preceding, the TLC is equal to the number of minimum service period months, less the number of months completed service, multiplied by the appropriate VC monthly rate for the data rate option to which the customer subscribed. This TLC will not exceed the monthly rate for the option to which the customer subscribed, multiplied by the minimum service period months as specified in 7.4.4. (N)

Certain material previously appearing on this page now appears on 2nd Revised Page 7-103.24.2

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ACCESS SERVICE

7 – Special Access (a.k.a. BellSouth SPA) Service (Cont'd)

7.4 Rates and Regulations (Cont'd) (N)

7.4.30 BellSouth DS1 Diverse Service (N)

Monthly rates and nonrecurring charges as specified in 7.5.9 following apply for BellSouth DS1 Diverse service. Nonrecurring charges will not apply for BellSouth DS1 Diverse service Local Channels when furnished under a payment plan other than month-to-month. (N)

BellSouth DS1 Diverse service is available under several payment plans: Month-to-Month (with a minimum of 4 months), Plan A (12 to 36 months), Plan B (37 to 60 months) and Plan C (61 to 96 months). Plans A, B, and C are provided under conditions specified in the Transport Payment Plan (TPP) located in 2.4.8(D) preceding, except as modified following: (N)

(A) A termination liability charge will be applicable as specified in 2.4.8(D) preceding if BellSouth DS1 Diverse service elements are disconnected prior to the end of the customer-specified service period. (N)

(B) BellSouth DS1 Diverse service is eligible for credit of Nonrecurring Charges under provisions of the Service installation Guarantee (SIG) as specified in 2.4.9 preceding. (N)

(C) Short Interval Charges are applicable for BellSouth DdS1 Diverse service as specified in 5.1.1 preceding. (N)

(D) No charges apply for the conversion of existing BellSouth DS1 Diverse service from a Month-to-Month arrangement to a TPP arrangement. (N)

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ACCESS SERVICE

7 - Special Access (a.k.a. BellSouth SPA) Service (Cont'd)

7.5 Rates and Charges (Cont'd)

7.5.21 BellSouth ADSL Service (Cont'd)

(D) Miscellaneous Charges

(1) Service Rearrangement Charge

	Nonrecurring Charge Per VC	Monthly Rate Per VC	USOC	
(a) Per VC redirected to a different XAATMS or MSATMS Port	$10.00	-	ADR	(C)
(b) Per changed VC Destinations or Sessions capability	$20.00	-	ADRPC	(C)

(E) End-User Aggregation

(1) Arrangement Capacities

	Nonrecurring Charge	Monthly Rate	USOC
(a) Per 44.210 Mbps Transport Capacity	$600.00	$1,000.00	ADFA4
(b) Per 149.760 Mbps Transport Capacity	$600.00	$1,800.00	ADFA5

(2) Destinations and Sessions

	Destinations	Sessions Per Line	Nonrecurring Charge	Monthly Rate	USOC
(a)	1	1	-	$ .60	ADFSA
(b)	1	2	-	$3.50	ADFSB
(c)	2	1	-	$3.50	ADFSC
(d)	2	2	-	$6.50	ADFSD
(e)	3	1	-	$6.50	ADFSE
(f)	3	2	-	$9.50	ADFSF

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ACCESS SERVICE

7 – Special Access (a.k.a. BellSouth SPA) Service (Cont'd)

7.4 Rate Regulations (Cont'd)

7.4.29 BellSouth ADSL Service (Cont'd)

(G) Cont'd

The TLC for VCs at data rates specified in 7.2.17(C)(3) through (7) having a customer-selected commitment period greater than 12 months, but disconnected prior to completion of the commitment and prior to completion of 13 months service, is equal to:

Minimum Downstream Data Rate	Commitment Period of: From 13 To 24 Months	25 Months Or More
1.5 Mbps	$200.00	$ 400.00
2.0 Mbps	$500.00	$1000.00
4.0 Mbps	$500.00	$1000.00
384 Kbps	$200.00	$ 400.00
192 Kbps	$200.00	$ 400.00

The TLC for VCs at data rates specified in 7.2.17(C)(3) through (7) having a customer-selected commitment period greater than 24 months, but disconnected prior to completion of the commitment, prior to completion of 25 months service and subsequent to completion of 13 months service, is equal to:

Minimum Downstream Data Rate	Commitment Period of: 25 Months Or More
1.5 Mbps	$200.00
2.0 Mbps	$500.00
4.0 Mbps	$500.00
384 Kbps	$200.00
192 Kbps	$200.00

TLC does not apply if:

(1) A customer cannot synchronize its terminal equipment with BellSouth ADSL service equipment; (S)(X)
(2) A customer disconnects a VC installed between the dates of November 29, 2000 and May 29, 2001 for the data rates specified in 7.2.17(C)(1) and (2); (N)(Y) (N)(Y) (N)(Y)

(X) Issued under authority of Special Permission No. 01-038

(Y) Scheduled to become effective on May 29, 200I, under the authority of Special Permission No. 01-038

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ACCESS SERVICE

7 – Special Access (a.k.a. BellSouth SPA) Service (Cont'd)

7.4 Rate Regulations (Cont'd)

7.4.29 BellSouth ADSL Service (Cont'd)

(G) Cont'd

(3) A BellSouth ADSL service VC is disconnected prior to completion of the appropriate minimum service period as a result of a customer requested change to a higher or lower peak minimum or maximum downstream data rate:

(a) TLC will not apply for changes from the current VC peak data rate to a VC having a higher downstream peak data rate. However, a new minimum service period as specified in (A) and (B) preceding and rates appropriate for the new data rate as specified in 7.5.21 following will apply. When requested, the appropriate charge for this change will be the sum of all nonrecurring charges appropriate for provisioning of new BellSouth ADSL service, for the new peak data rate.

(b) Except for changes to the data rate option specified in 7.2.17(C)(1), TLC will not apply for changes from the current VC peak data rate to a VC having a lower downstream peak data rate. When requested, the appropriate charge for this change will be the sum of all nonrecurring charges appropriate for provisioning of new BellSouth ADSL service, for the new peak data rate. A new minimum period as specified in (A) and (B) preceding and rates appropriate for the new data rate specified in 7.5.21 following will apply. Changes to a lower downstream peak data rate prior to completion of the minimum service period as specified in (A) and (B) preceding for the current data rate will result in the application of TLC. Changes from data rate options specified in 7.2.17(C)(2) through (7) to the data rate option specified in 7.2.17(C)(1) are not allowed.

(H) Service Rearrangement

(a) The Service Rearrangement Charge specified in 7.5.21(D)(1)(a) is applicable on a per VC rearranged basis for customer requests to redirect a VC from one BellSouth XAATMS or MSATMS port to a different BellSouth XAATMS or MSATMS port, where both ports are on the same switch and both ports are utilized in terminating transport facilities for BellSouth ADSL service without End-User Aggregation. Customer requests to redirect a BellSouth ADSL service VC between BellSouth ADSL service, End-User Aggregation and non-End-User Aggregation transport facilities will constitute a disconnect of existing service and an installation of new service as set forth in 7.4.29(I)(3) and (4) following. (C) (C)

(b) The Service Rearrangement Charge specified in 7.5.21(D)(1)(b) is applicable per VC rearranged basis for customer requests to change the number of Destinations and/or Sessions from the number of Destinations and/or Sessions previously specified by the customer.

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ACCESS SERVICE

7 – Special Access (a.k.a. BellSouth SPA) Service (Cont'd)

7.4 Rate Regulations (Cont'd)

7.4.29 BellSouth ADSL Service (Cont'd)

(I) Per VC Testing Capability is provided at no additional nonrecurring charge whether requested coincident with the initial request for BellSouth ADSL service, End-User Aggregation, or subsequent to the initial request. (N)(N)(N)(N)

(J) A monthly recurring rate will be billed to the customer for each BellSouth ADSL service, End-User Aggregation arrangement, on a per transport capacity basis. With the exception of per VC Testing Capability, a monthly recurring rate for Destinations and Sessions Per Line is applicable on a per end-user basis. Per VC Testing Capability is provided at no additional recurring charge. (T)(C)(C)(N)(N)

(1) A customer request to discontinue a BellSouth ADSL service, End-User Aggregation arrangement will result in disconnection of service for all end-users served by that arrangement. Disconnection of a BellSouth ADSL service, End-User Aggregation arrangement will also result in application of any applicable termination charges for all associated elements of the customer's affected BellSouth ADSL service.

(2) While the number of Destinations and Sessions Per Line may be changed upon customer request, the minimum number of Destinations and Sessions Per Line, on a per end-user basis, is one Destination and one Session Per Line. The charge for changing Destinations and Sessions Per Line is specified in 7.5.21(D)(1)(b).

(3) Customer requests to disconnect VCs served by a BellSouth ADSL service arrangement without End-User Aggregation, for the purpose of reconnection via a BellSouth ADSL service, End-User Aggregation arrangement will require that a service order be issued for each affected end-user premises and all nonrecurring charges applicable for new service at the affected end-user premises will apply.

A Termination Liability Charge (TLC) as specified in 7.4.29(G) is applicable for VCs that are disconnected prior to completion of the appropriate minimum service period as set forth in 7.4.4.

(4) Customer requests to disconnect VCs served by a BellSouth ADSL service, End-User Aggregation arrangement, for the purpose of reconnection via a BellSouth ADSL service arrangement without End-User Aggregation will require that a service order be issued for each affected end-user premises and all nonrecurring charges applicable for new service at the affected end-user premises will apply.

A Termination Liability Charge (TLC) as specified in 7.4.29(G) is applicable for VCs that are disconnected prior to completion of the appropriate minimum service period as set forth in 7.4.4.

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ACCESS SERVICE

7 – Special Access (a.k.a. BellSouth SPA) Service (Cont'd)

7.4 Rate Regulations (Cont'd)

7.4.29 BellSouth ADSL Service (Cont'd)

(K) The customer will be responsible for payment of a Maintenance of Service charge as specified in 13.3.1(E) when a customer reports a trouble to the Telephone Company for clearance and no trouble is found in the Telephone Company's facilities. (T)

(L) A BellSouth ADSL service customer may request BellSouth ADSL service be provisioned to a designated end-user premises for purposes of demonstration, for a period not to exceed 5 calendar days. Demonstration requests will be accommodated no more frequently than once in thirty calendar days per designated end-user premises. The appropriate Virtual Circuit nonrecurring charge specified in 7.5.21(A), (B) or (C) will apply. (T)

If notified by the customer prior to expiration of the five day demonstration period that the Telephone Company should not disconnect the designated end-user premises, normal monthly billing will commence on the date that notification is received and additional nonrecurring charges are not applicable. If the five day period has expired, service ordered at that same customer-designated premises will be as for new service and the terms and conditions and appropriate rates and charges applicable for new service will apply.

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BellSouth Interconnection Services
675 West Peachtree St., NE
Room 34S91
Atlanta, Georgia 30375

Nicole Bracy
(404) 927-7596
FAX: 404 529-7839

Sent Via Electronic Mail

November 21, 2003

Robert A. Bye
Cinergy Communication Company
8829 Bond Street
Overland Park, KS 66214

Dear Bob:

On September 10, 2003, Cinergy Communications Company ("Cinergy") sent BellSouth Telecommunications, Inc. ("BellSouth") a letter requesting an Amendment to the Interconnection Agreements ("Agreement") between the Parties to reflect changes resulting from the Report and Order and Order on Remand and Further Notice of Proposed Rulemaking ("Triennial Order") issued by the Federal Communications Commission and effective October 2, 2003.

Pursuant to the Triennial Order, BellSouth's obligations under the Act have been materially modified in numerous aspects. The Order sets forth those unbundled network elements that BellSouth must make available to CLECs at a cost based rate, as well as certain facilities that are no longer subject to unbundling.

Attached for your review is BellSouth's proposed Amendment, which replaces Attachment 2 – Network Elements and Other Services and Attachment 6 – Pre-Ordering, Ordering, Provisioning, Maintenance and Repair in their entirety. These new attachments reflect the changes resulting from the Triennial Order and additional service enhancements such as Loop Tagging, and Melded Tandem Switching Rate. The Amendment also addresses other issues important to BellSouth and Cinergy.

In addition, BellSouth has developed a Market Based Agreement for those services and facilities that BellSouth is no longer required to provide at cost based rates. This agreement is attached for your review.

Pursuant to the Modification of Agreement section of General Terms and Conditions of the Agreement, BellSouth and Cinergy must complete negotiations of this Amendment within 90 days of September 10, 2003. BellSouth is confident this can be accomplished and is available to work with Cinergy in reaching a mutually agreeable Amendment.

Upon review, if acceptable, please print one full original amendment and one full original Market Based Rate Agreement as well as duplicate signature pages for both documents. Execute all original signature pages and return to me within 14 calendar days at the above address for execution on behalf of BellSouth. Once executed, I will return a fully executed signature page to you for your records. If more than 14 days elapses, please contact me before signing and returning.

Should you have any questions, please contact me at the number above.

Sincerely,

Nicole Bracy
Manager, Interconnection Services

BellSouth Corporation
Legal Department
675 West Peachtree Street, N.E.
Suite 4300
Atlanta, GA 30375-0001

annamarie.lemoine@bellsouth.com

Annamarie Lemoine
Senior Counsel

404 335 0719
Fax 404 614 4054

November 5, 2003

Robert A. Bye
Vice President and General Counsel
Cinergy Communications Company
8829 Bond Street
Overland Park, KS 66214

Re: Request for Amendment to Interconnection Agreement due to Change in Law

Dear Bob:

I am responding to your September 10, 2002 letter to Nicole Bracy requesting an Amendment to our Interconnection Agreement pursuant to its Change-in-Law Modification provision. I have tried to contact you a number of times regarding this matter, but with both of our busy schedules we have only engaged on a prolonged game of phone tag. Therefore, I thought it best to provide BellSouth's response with this letter.

You base your request on the Federal Communications Commission's ("FCC") recently effective Triennial Review Order ("TRO") and the commingling rules promulgated therein. For several reasons, the commingling provisions of the TRO should not be construed to apply to the DSL over UNE–P issue. First, "commingling" is the "connecting," "attaching" or "combining" of a UNE or UNE combination with a tariffed facility. The low-frequency portion of the loop does not constitute a UNE, because the FCC only required the unbundling of the entire loop (both high and low frequency together). Moreover, DSL over UNE-P does not involve the connection, attaching or combining of a UNE with a tariffed facility because it requires the Incumbent Local Exchange Carrier ("ILEC") to provision its DSL services over the same line. Furthermore, in a DSL over UNE-P arrangement, BellSouth's DSL service is not provided to a "requesting telecommunications carrier." Rather, it is provided to an Internet access provider. For this additional reason, DSL over UNE-P does not fall under the commingling requirement, because it does not involve a wholesale facility or service that a requesting telecommunications carrier has obtained from the ILEC and seeks to connect or combine with a UNE.

Instead, the FCC specifically addressed this issue in Paragraph 270, wherein it rejected an argument by CompTel to separately unbundle the low frequency portion of the loop, which would enable the Competitive Local Exchange Carrier ("CLEC") to obtain voice capability on a loop where the ILEC retains the data capability. In rejecting CompTel's argument, the FCC concluded that unbundling the low frequency portion of the loop is not necessary to address CLEC impairment because line splitting rules allow narrowband CLECs to partner with other CLECs that offer DSL services.

Given the above, it is quite clear that the TRO does not require BellSouth to commingle our wholesale services with UNE – P. Accordingly, BellSouth cannot comply with your request to amend the interconnection agreement for this purpose. However we will continue to provide you wholesale DSL over UNE-P in Kentucky pursuant to the Kentucky Public Service Commission's Order in Case No. 2001-00432, as long as it remains effective.

Sincerely,

Annamarie Lemoine

cc: Nicole Bracy

Bob Bye

From: Bob Bye [bye@cinergycom.com]
Sent: Thursday, October 02, 2003 5:48 PM
To: 'Bracy, Nicole'; 'Lemoine, Annamarie'
Cc: 'John Cinelli'; 'Al Cinelli'; 'Pat Heck'; 'Henry Walker'; 'Bob Bye'
Subject: Request for amendment due to change in law

Nicole,

On Septemeber 10th, Cinergy Communications made its initial request for an amendment due to chagne in law. The contents of that letter are incorporated herein by reference. In addition, this is to also request commingling of DSL and UNE-P in KY. While we already have this right in Kentucky, I want to make sure that our ability to commingle is not taken away to the extent BellSouth wins its appeal of our arbitration decision. In your response of September 17, 2003, you directed me to submit an email on this date to again request the amendment. This email shall invoke Sections 16.3 and 17.3 of the respective agreements per your instructions and express waiver of the formal notice requirements contained in those agreements.

The new regulations at issue which require a change in law are 47 CFR 51.309(e) and (f) which provide:

(e) Except as provided in 51.318, an incumbent LEC shall permit a requesting telecommunciations carrier to commingle an unbundled network element or combination of unbundled network elements with wholesale services obtained from an incumbent LEC.

(f) Upon request, an incumbent LEC shall perform the functions necessary to commingle an unbundled network element or a combination of unbundled network elements whith one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC.

Currently, BellSouth's tariffs for wholesale DSL transport provide a limitation that requires provisioning only over in-service BellSouth controlled access lines. BellSouth interprets this to mean only lines where BellSouth carries the voice or lines which are provided by a CLEC via resale. Pursuant to the above-referenced regulation, Cinergy Communications is requesting that BellSouth modify its tariff and incorporate language into the interconnection agreement that would overturn this restriction and allow Cinergy Communications to provide UNE-P or UNE-L and wholesale DSL transport commingled over a single copper loop.

Paragraph 581 of the TRO provides, "we require incumbent LECs to effectuate commingling by modifying their interstate access service tariffs to expressly permit connections with UNEs and UNE combinations." DSL transport is an access service and contained in BellSouth's access tariff. In fact, BellSouth argued in briefs and before the U.S. Dist. Ct. in Kentucky that DSL was an access service, so no argument can be made that this rule does not apply to DSL transport.

To the extent BellSouth will not comply, Cinergy Communications is prepared to pursue all available remedies. The FCC has already determined in the TRO that this practice is unjust and unreasonable under 201 of the Act as well as an undue and unreasonable prejudice or advantage under 202 of the Act.

Because the above issue relates to a specific, valid regulation, there is no need to wait until the states have completed their impairment analysis to conclude negotiations. Nor is there anything in the interconnection agreement that would require the parties to include all impairment issues in our negotiations. To the contrary, we are entitled to this relief as of today and demand access as soon as possible.

This is to request that SBC negotiate this issue in good faith. Good faith requires, at a minimum, assigning a representative to negotiate who is up to speed on the issues and who has authority to bind the company. I would be more than happy to travel to Atlanta to meet with the appropriate BellSouth representative in person to resolve this issue.

I look forward to working with you and resolving this matter in an amicable and timely fashion.

Robert A. Bye
Vice President and General Counsel
Cinergy Communications Company
8829 Bond St.
Overland Park, KS 66214
(913) 492-1230 ext. 5132
(812) 759-1732 (Fax)

BELLSOUTH

BellSouth Interconnection Services
675 W. Peachtree Street, NE
34S91
Atlanta, Georgia 30375

Nicole Bracy
(404) 927-7596
FAX (404) 529-7839

Sent Via Email and U.S. Mail

September 17, 2003

Mr. Robert A. Bye
Cinergy Communications Company
8829 Bond Street
Overland Park, KS 66214

Re: Request for Amendment to Interconnection Agreement due to change in law

Dear Bob:

This is in response to your letter dated September 10, 2003, regarding Cinergy Communications Company's (Cinergy) request to amend its Interconnection Agreement for the states of Alabama, Florida, Georgia, Louisiana, North Carolina and South Carolina ("Region-wide Agreement") to include provisions for commingling Unbundled Network Element-Platform (UNE-P) with BellSouth's wholesale DSL transport. Cinergy is also requesting to amend its Kentucky and Region-wide Agreements to include provisions for commingling UNE-P with BellSouth's wholesale voice mail product, as well as any other tariffed offering provided by BellSouth.

The General Terms and Conditions in Section 16.3 of Cinergy's Region-wide Agreement and Section 17.3 of Cinergy's Kentucky Agreement states:

> "In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of Cinergy or BellSouth to perform any material terms of this Agreement, Cinergy or BellSouth may, on fifteen (15) days' written notice...."

Although the Federal Communications Commission's Triennial Review Order (TRO) has been released, it is not effective before October 2, 2003. Thus, the language allowing either party to request renegotiation of affected terms upon 15 days notice has not yet been triggered. Once the TRO has become effective, Cinergy will need to send an e-mail or written notice to BellSouth to invoke Sections 16.3 and 17.3 of the respective Agreements.

Once the Parties enter into negotiations for Cinergy's requests to commingle, we will address the substantive issues raised in your letter.

If you have any questions, please give me a call.

Sincerely,

Nicole Bracy
Manager, Interconnection Services

Cinergy Communications Company
8829 Bond Street
Overland Park, KS 66214
phone 913.492.1230
fax 913.492.1684

September 10, 2003

CINERGY. COMMUNICATIONS

Via Federal Express

Ms. Nicole Bracy
Manager, Interconnection Services
BELLSOUTH INTERCONNECTION SERVICES
675 W. Peachtree Street, NE
Room 34S91
Atlanta, GA 30375

Re: Request for amendment to Interconnection agreement due to change in law

Dear Nicole:

As I indicated to you in our conversation of September 5, 2003, this letter is to request an amendment to the Interconnection Agreement between Cinergy Communications Company and BellSouth for the states of Alabama, Florida, Georgia, Lousisiana, North Carolina, and South Carolina effective as of February 26, 2003. This request shall serve as the fifteen (15) day written notice, pursuant to paragraph 16.3 of the aforementioned agreement, requesting a renegotiation due to a change in law.

The change in law results from the release of the Triennial Review Order ("TRO") and the related federal rules which become effective October 2, 2003. The relevant new rules are 47 CFR § 51.309(e) and (f) which provide:

> (e) Except as provided in § 51.318, an incumbent LEC shall permit a requesting telecommunications carrier to commingle an unbundled network element or a combination of unbundled network elements with wholesale services obtained from an incumbent LEC.
>
> (f) Upon request, an incumbent LEC shall perform the functions necessary to commingle an unbundled network element or a combination of network elements with one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC.

"Commingling" is a newly defined term in the regulations: Commingling means the connecting, attaching, or otherwise linking of an unbundled network element, or a

combination of unbundled network elements, to one or more facilities or services that a requesting telecommunications carrier has obtained at wholesale from an incumbent LEC, or the combining of an unbundled network element, or a combination of unbundled network elements, with one or more such facilities or services.

Based upon the foregoing, Cinergy Communications is requesting the ability to commingle UNE-P and wholesale DSL transport. As a means of avoiding operational delays, Cinergy Communications will agree to extend the DSL over UNE-P language agreed to in the parties' Kentucky agreement to the regionwide agreement. For your convenience, I have attached a copy of the previously agreed-to language as Exhibit "A." Since this interim solution appears to be working in Kentucky between the parties, it seems reasonable to extend this experience into the remainder of the BellSouth territory.

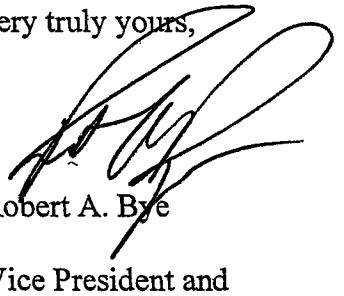
Cinergy Communications is also requesting an amendment to both the Kentucky and regionwide interconnection agreements with BellSouth to include a commingling of UNE-P with BellSouth's wholesale voicemail product, as well as any other tariffed offering provided by BellSouth.

For further information on the commingling issue, see paragraphs 579 through 584 of the TRO. It makes clear that BellSouth must revise its tariffs to allow for commingling.

Cinergy Communications reserves the right to a future true-up to allow for this change in law. Nothing herein shall be construed as a waiver of any other rights to which Cinergy Communications may be entitled as a result of the TRO or other change in law. This request is limited to the issue of commingling. In the event BellSouth will not agree to an amendment as requested herein with fifteen (15) days, Cinergy Communications reserves all rights it may have to pursue civil damages and other penalties for denial of commingling rights.

I look forward to working with you to reach an amicable resolution of this matter. If you have any questions, or wish to discuss this in detail, please do not hesitate to give me a call.

Very truly yours,



Robert A. Bye

Vice President and
General Counsel

cc:

BellSouth Telecommunications, Inc.
BellSouth Local Contract Manager
600 North 19th Street, 8th Floor
Birmingham, Alabama 35203

and

BellSouth Telecommunications, Inc.
ICS Attorney
Suite 4300
675 W. Peachtree St.
Atlanta, GA 30375

Ex. "A"

available, Cinergy Communications Company may utilize the Unbundled Loop Modification process or the Special Construction process, as applicable, to obtain the Loop type ordered.

2.10.1 DSL TRANSPORT SERVICE ON UNE-P

2.10.1.1 For purposes of this Section 2.10.1.1, the term "DSL," "DSL transport," or "DSL Transport Services" shall mean that DSL transport service in the BellSouth F.C.C. Number 1 tariff in effect as of, July 12, 2002, the date of the Kentucky Public Service Commission's Order in Case No. 2001-00432. In order to comply with the Order, BellSouth shall not refuse to provide any DSL transport service to a network service provider pursuant to a request from such network service provider who serves, or desires to serve, an end-user that receives UNE-P based voice services from Cinergy Communications. However, BellSouth shall have no obligation to provide DSL transport on any loop that is not qualified for DSL, provided that BellSouth shall not make a change to any loop so as to make it not qualify for DSL on the basis of that such loop is being converted to UNE-P, rather than on the basis of architectural, mechanical, or physical limitations.2.10.1.2 The Order in is predicated upon the ability of customers of Cinergy Communications to receive wholesale ADSL transport at the same price it was available pursuant to Bellsouth Tariff F.C.C. Number 1 on the date of that Order. In the event this offering is no longer available for any reason, BellSouth agrees to provide to Cinergy Communications a wholesale ADSL transport product for the duration of this interconnection agreement on the same pricing, terms and conditions as those in the BellSouth Tariff F.C.C. Number 1 as of the date of the Order subject to section 2.10.1.1 above. The terms and prices of BellSouth Tariff F.C.C. Number 1 as it existed on the date of the Order are incorporated herein by reference as necessary to comply with this section.

2.10.1.3 Notwithstanding the foregoing, BellSouth shall have no obligation to provide its retail, DSL-based high speed Internet access service, currently known as BellSouth® FastAccess® DSL service, to an end-user that receives UNE-P based voice services from Cinergy. To the extent BellSouth chooses to deny FastAccess to an end user, BellSouth shall not seek any termination penalties against, or in any other fashion seek to penalize, any such end-user that Cinergy identifies to BellSouth pursuant to a process to be agreed upon and reduced to writing. BellSouth shall also notify the aforementioned end-user at least ten (10) days prior to discontinuing its FastAccess service.

2.10.1.4 Cinergy shall make available to BellSouth at no charge the high frequency spectrum on UNE-P for purposes of enabling BellSouth to provision DSL transport on the same loop as the UNE-P based voice service.

2.10.1.5 When BellSouth provides tariffed DSL transport over Cinergy UNE-P, BellSouth shall have the right, at no charge, to access the entire loop for purposes of troubleshooting DSL-related troubles.

2.10.1.6 BellSouth shall not be obligated to provide tariffed DSL transport in accordance with this Section 2.10.1 until completion of the modification of systems and processes that will enable BellSouth to qualify Cinergy UNE-P lines for DSL as well as maintain and repair such DSL on Cinergy UNE-P lines. Until such time as BellSouth completes the aforementioned modification of systems and processes, BellSouth agrees to provide to Cinergy Communications wholesale DSL transport service over resale lines on the following conditions: (1) the underlying resale line and its features shall be provided by BellSouth to Cinergy Communications at the rate that Cinergy Communications normally pays for a UNE-P loop/port combination in the pertinent UNE Zone, specifically excluding subscriber line charges, and other charges normally associated with resale; (2) BellSouth shall bill and collect the access or other third party charges applicable to such lines, and shall remit to Cinergy monthly, as a surrogate for such access charges, an amount determined in accordance with the formula set forth in Section 2.10.1.6.1 below; (3) because BellSouth cannot provide hunting between resale and UNE-P lines, any other lines of the end-user served by Cinergy Communications shall also be converted to resale at no charge upon submission of an LSR for such conversion and provided pursuant to (1) and (2) above unless and until BellSouth agrees to provide hunting between resale and UNE-P platforms; and (4) once the aforementioned modification of systems and process is completed, BellSouth agrees to convert all end-user lines affected by this section to UNE-P at no charge upon Cinergy Communications' submission of an executable LSR for such conversion.

2.10.1.6.1 The parties agree that the amount payable to Cinergy as a surrogate for access charges in accordance with Section 2.10.1.6 above shall be determined by multiplying the average number of Cinergy resale lines with DSL service, and those lines included in a hunt group with such DSL resale lines in accordance with subsection 3 of Section 2.10.1.6 above, for the most recent three (3) billing cycles preceding the date of this agreement by $12.00 per line. Such rate is based upon Cinergy's estimate of its access charges, including subscriber line charges, presubscribed interexchange carrier charges, and usage charges, on a per line basis. Within sixty (60) days following the date of this Agreement and upon BellSouth's request, the parties agree to true up this amount to conform with the average per line access charges Cinergy collects on its UNE-P lines. Cinergy shall provide supporting documentation to justify the true up amount.

2.10.1.6.2 The Parties agree that subject to Section 2.10.1.6.1, the rates charged pursuant to Section 2.10.1.6 above are not subject to true-up regardless of appeal or change in law. Any change to these rates or to the provisions of Section 2.10.1 et seq. shall

be prospective only in the event of a change in law as described in the General Terms and Conditions of this Agreement.

2.10.1.7 Cinergy Communications shall provide BellSouth with all current pertinent customer information necessary for BellSouth to comply with this section. Cinergy Communications authorizes BellSouth to access customer information on BellSouth systems as necessary for BellSouth to comply with this section. BellSouth shall provide Cinergy Communications with all current pertinent loop information necessary for Cinergy Communications to provide DSL over UNE-P, including but not limited to, loop qualification information for UNE-P lines.

2.10.1.8 If a request is made for DSL on an existing Cinergy Communications UNE-P line, Cinergy shall cooperate with BellSouth in an effort to determine loop make-up and qualification status. The parties shall mutually agree on a procedure and shall reduce same in writing.

3. High Frequency Spectrum Network Element

3.1 General

3.1.1 BellSouth shall provide Cinergy Communications Company access to the high frequency spectrum of the local loop as an unbundled network element only where BellSouth is the voice service provider to the end user at the rates set forth in this Attachment.

3.1.2 The High Frequency Spectrum is defined as the frequency range above the voiceband on a copper loop facility carrying analog circuit-switched voiceband transmissions. Access to the High Frequency Spectrum is intended to allow Cinergy Communications Company the ability to provide Digital Subscriber Line ("xDSL") data services to the end user for which BellSouth provides voice services. The High Frequency Spectrum shall be available for any version of xDSL complying with Spectrum Management Class 5 of ANSI T1.417, *American National Standard for Telecommunications, Spectrum Management for Loop Transmission Systems*. BellSouth will continue to have access to the low frequency portion of the loop spectrum (from 300 Hertz to at least 3000 Hertz, and potentially up to 3400 Hertz, depending on equipment and facilities) for the purposes of providing voice service. Cinergy Communications Company shall only use xDSL technology that is within the PSD mask for Spectrum Management Class 5 as found in the above-mentioned document.

3.1.3 Access to the High Frequency Spectrum requires an unloaded, 2-wire copper Loop. An unloaded Loop is a copper Loop with no load coils, low-pass filters, range extenders, DAMLs, or similar devices and minimal bridged taps consistent with ANSI T1.413 and T1.601.

Bob Bye

From: sysdeliv@fn3a.prod.fedex.com
Sent: Thursday, September 11, 2003 8:55 AM
To: bye@cinergycom.com
Subject: FedEx shipment 792325957808

Our records indicate that the shipment sent from SUSAN LOPEZ/CINERGY COMMUNICATIONS COMPA
to ICS ATTORNEY/BELLSOUTH TELECOMMUNICATION has been delivered.
The package was delivered on 09/11/2003 at 9:34 AM and signed for
or released by W.SHAW.

The ship date of the shipment was 09/10/2003.

The tracking number of this shipment was 792325957808.

FedEx appreciates your business. For more information about FedEx services,
please visit our web site at http://www.fedex.com

To track the status of this shipment online please use the following:
http://www.fedex.com/cgi-bin/tracking?tracknumbers=792325957808
&action=track&language=english&cntry_code=us

Disclaimer

FedEx has not validated the authenticity of any email address.

Bob Bye

From: sysdeliv@fn3a.prod.fedex.com
Sent: Thursday, September 11, 2003 8:55 AM
To: bye@cinergycom.com
Subject: FedEx shipment 791496724486

Our records indicate that the shipment sent from SUSAN LOPEZ/CINERGY COMMUNICATIONS COMPA
to MS. NICOLE BRACY, MANAGER/BELLSOUTH INTE has been delivered.
The package was delivered on 09/11/2003 at 9:34 AM and signed for
or released by W.SHAW.

The ship date of the shipment was 09/10/2003.

The tracking number of this shipment was 791496724486.

FedEx appreciates your business. For more information about FedEx services,
please visit our web site at http://www.fedex.com

To track the status of this shipment online please use the following:
http://www.fedex.com/cgi-bin/tracking?tracknumbers=791496724486
&action=track&language=english&cntry_code=us

EXHIBIT F

IN THE MATTER OF THE COMMISSION INVESTIGATION AND GENERIC PROCEEDING ON AMERITECH INDIANA'S RATES FOR INTERCONNECTION, SERVICE, UNBUNDLED ELEMENTS, AND TRANSPORT AND TERMINATION UNDER THE TELECOMMUNICATIONS ACT OF 1996 AND RELATED INDIANA STATUTES

CAUSE NO. 40611-S1

Indiana Utility Regulatory Commission

2003 Ind. PUC LEXIS 116

February 17, 2003, Approved

CORE TERMS: loop, network, splitter, subloop, fiber, customer, unbundled, card, conditioning, carrier, fill, copper, architecture, database, unbundling, collocation, qualification, cable, recurring, user, terminal, splitting, requesting, plant, central office, download, remote, dark, switching, packet

PANEL: **[*1]** William D. McCarty, Chairman; Abby R. Gray, Administrative Law Judge; Carol S. Comer, Administrative Law Judge

OPINION: PHASE II

BY THE COMMISSION:
William D. McCarty, Chairman
Abby R. Gray, Administrative Law Judge
Carol S. Comer, Administrative Law Judge

On January 18, 2001, the Indiana Utility Regulatory Commission issued its Order in this Cause opening an investigation to consider issues that had not been finalized in the 40611 Cause. The Order also found that Indiana Bell Telephone Company, Incorporated d/b/a Ameritech Indiana ("Ameritech Indiana" or "Ameritech") and other interested parties should file comments on what open issues and unbundled network elements ("UNEs") should be addressed in this docket. Initial Comments were filed by Ameritech Indiana, Sprint Communications Company, L.P. and United Telephone Company of Indiana, Inc., d/b/a/ Sprint ("Sprint"), the Intelenet Commission ("Intelenet") and Indiana competitive local exchange carriers ("CLECs"), consisting of AT&T Communications of Indiana, Inc. and TCG Indianapolis (collectively "AT&T"), WorldCom, Inc. ("WorldCom"), McLeodUSA ("McLeod"), Time Warner Telecom of Indiana, L.P. ("Time Warner") and Z-TEL **[*2]** Communications ("Z-Tel"). Ameritech Indiana and the Indiana Office of the Utility Consumer Counselor ("OUCC") filed Reply comments.

On February 1, 2001, the Intelenet Commission filed its Request for Intervention. The Commission granted the Intelenet Commission's Request to Intervene on February 9, 2001.

On August 2, 2001, at 1:30 p.m. in Room TC10, Indiana Government Center South, Indianapolis, Indiana, pursuant to notice duly published as required by law, a prehearing conference and preliminary hearing was held in this Cause. At the prehearing conference, Ameritech Indiana, the OUCC, WorldCom, McLeodUSA, Intelenet, Time Warner and Z-Tel appeared and participated. Representatives of Sprint and AT&T also appeared and participated in discussions held off the record. The Commission determined that this Cause should be divided into two phases. The Commission issued its Prehearing Conference Order on August 29, 2001, which, among other things, established the issues to be considered in Phase I and Phase II of this subdocket.

On March 28, 2002, we issued our Order in Phase I of this proceeding.

exists in the number of DSL ports than can be configured on the Litespan 2000. Moreover, unused port capacity on a line card is an engineering reality that applies to all carriers, not just CLECs, but it only applies to the last card utilized for each subtending service area. *Id.* Further, the evidence shows in other Project Pronto proceedings that it is Ameritech's engineering practice to install enough line cards at one time to serve projected demand for six to twelve months. *Id.* Thus, it is Ameritech's own practice to occupy, and then not use, far more card slot capacity.

We find that Mr. Boyer's "cost analysis" for bandwidth exhaust similarly flawed. He estimates that the Channel Bank Assemblies would have to be "undaisychained" at a significant percentage of Ameritech RT sites in order to provide other types of DSL-capable loops, such as HDSL2 or SHDSL, or other ATM QoS classes or higher bandwidth CBRs. However, Mr. Boyer provides no support for his high percentage. As Covad testified, the single 155 Mbps OC3c **[*323]** initially configured by SBC/Ameritech on the Project Pronto architecture is a very large pipe, and can therefore provide much more than a few UBR PVCs. Covad Ex. 1, at 69. Thus, when total demand across that fiber system increases to near its capacity, one or more of the CBAs should be undaisychained. We agree with Covad that this reflects network growth, and is not a basis for denying CLECs access to the full range of technical features and functions of Pronto.

CLECs Are Impaired Without Access to Pronto On An End-To-End Basis.

The Commission's Authority

As noted above, we also find that even if the Project Pronto Architecture were not a loop, it should still be unbundled because CLECs are impaired without access to Pronto on an end-to-end basis. Much has been written about the impair standard recently. But what certainly has not changed is this Commission's authority to order the unbundling of Project Pronto under its authority under both the 1996 Act and independent state law. In conducting our impair analysis, we look both to currently applicable law (*e.g.*, the 1996 Act and the FCC's implementing rules and regulations). In addition, we also take the D.C. Circuit's **[*324]** recent ruling concerning the impair standard into account. While that ruling is not effective and presently stayed, we believe our findings here are fully consistent with that decision. Finally, we reiterate that our decision to unbundle Project Pronto is made pursuant to both federal and independent state law.

The Impair Standard

The 1996 Act and the FCC's rules provide the legal framework for determining what network elements ILECs must make available to CLECs. Ameritech must offer CLECs unbundled access to Ameritech's networks elements if, at a minimum, lack of access to an element would impair a CLEC's ability to provide a competitive service. *47 U.S.C. § 251*(d)(2). As explained below we find that Project Pronto meets the necessary and "impair" standard and should be offered as a UNE. n69

n69 All parties in this proceeding agree that the Project Pronto network elements at issue in this case are not proprietary.

The "impair" standard as included in 1996 Act and implemented **[*325]** in the FCC's rules requires ILECs to provide unbundled access to a network element if lack of access to that element "would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." *47 U.S.C. § 251*(d)(2)(B). More specifically, the FCC adopted a "materiality component" that provides for unbundling when there is a substantive difference between a CLEC utilizing a UNE or some alternative to offer a telecommunications service. *UNE Remand Order*, P 51. In other words, if lack of access to Project Pronto network elements would materially diminish the value of xDSL services that CLECs could offer, their ability to provide such services is "impaired." *UNE Remand Order*, P 51. In making a "materiality" determination, the FCC has found that the following factors must be considered: cost, timeliness, quality of available alternatives, ubiquity, and operational factors. *UNE Remand Order,* PP 62-100.

Even if there were not overwhelming evidence that Project Pronto must be unbundled under the impair standard, the Commission still has authority to unbundle Project Pronto on an independent federal **[*326]** ground. The FCC has held that a determination of the "impair standard" pursuant to § 251(d)(2) is not dispositive of whether unbundling is required. *UNE Remand Order*, P 103; *See also,* P 309. Pursuant to "the plain import of the 'at a minimum' language" in § 251(d)(2)" and in response to the U.S. Supreme Court's directive that the FCC should adopt "some limiting standard

rationally related to the goals of the Act" when determining what elements should be unbundled, the FCC adopted an additional test that state Commissions may use in determining whether unbundling is required. *UNE Remand Order*, PP 101, 103-104; 47 C.F.R. 51.317(b)(3). That test examines whether unbundling will result in "opening local markets to competition and how access to a given network element will encourage the rapid introduction of local competition to the benefit of the greatest number of customers." *UNE Remand Order*, P 103. In doing so, the FCC expressly rejected Ameritech's and other ILECs' proposal that additional unbundling requirements could not be adopted when the "necessary" or "impair" standards have not been met. *UNE Remand Order*, P 103. The FCC directed that the following five factors **[*327]** be considered under this unbundling test:

. Rapid Introduction of Competition in All Markets;
. Promotion of Facilities-Based Competition, Investment, and Innovation;
. Reduced Regulation;
. Certainty in the Marketplace; and
. Administrative Practicality.

47 C.F.R. § 51.317(b)(3). If we determine that the impair standard is not met, then we may still order unbundling of Project Pronto if the five factors listed above are met and would "open local markets to competition and how access to a given network element will encourage the rapid introduction of local competition to the benefit of the greatest number of customers." *UNE Remand Order*, P 103.

The 1996 Act delegates authority to the FCC and state commissions, often overlapping, to implement certain provisions of the 1996 Act. Section 215(d) of the 1996 Act, entitled "Implementation," charges the FCC with establishing regulations to implement the interconnection and access requirements of § 215. That same section preserves state commission authority to act as well. n70 In both its *First Report and Order* and in its more recent *UNE Rem and Order*, the FCC has not only acknowledged state commissions' roles but has **[*328]** consistently supported state commissions that identify additional UNEs. *First Report and Order*, P 136. *UNE Remand Order*, PP 15 (Executive Summary), 145, 153-154. Therefore, the 1996 Act and the FCC's rules grant the Commission clear authority to designate unbundled network elements beyond those that the FCC has adopted.

n70 *47 U.S.C. 251*(d)(3), provides: In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

Finally, we note that we have full authority to order the unbundling of Project Pronto on independent state law grounds, including Ind. Code § 8-1-2-5 to prescribe "reasonable **[*329]** conditions and compensations" for physical connections between two public utilities engaged in the conveyance of telephone messages and Ind. Code § 8-1-2-5(b) which specifically authorizes the Commission to "determine how and within what time such connection or connections shall be made, and by whom the expense of making and maintaining such connection or connections shall be paid." In unbundling Project Pronto here we are specifically relying on such state authority, as well as our authority under the 1996 Act.

D.C. Circuit Opinion

In *United States Telecom Ass'n v. FCC, 209 F.3d 424 (D.C. Cir. 2002),* the D.C. Circuit remanded the *UNE Remand Order* to the FCC based on its conclusion that the FCC's impairment analysis was defective on two grounds: (1) the FCC had not explained why the cost disparities used to justify unbundling of particular elements were different from those faced by "virtually any new entrant in any sector of the economy;" and (2) the FCC had not adequately considered whether rules should be geographically differentiated for particular elements. n71 We address both these grounds in our assessment of impairment. In addition, **[*330]** in acknowledgment of the D.C. Circuit's decision to remand the *Line Sharing Order*, we will also consider the implications of intermodal competition from cable and other sources in our impair analysis.

n71 *209 F. 3d at 426-27.*

With that said, we note that on July 8, 2002, the FCC filed a petition for rehearing of the *USTA* decision with the D.C. Circuit, arguing that the panel's decision was directly contrary to both the long-standing principles of *Chevron* deference, and to the Supreme Court's decision in *Verizon v. FCC*. Covad and other CLECs also filed petitions in support of the Commission's rehearing request. The FCC's request for rehearing automatically "stays the mandate until disposition of the petition or motion." n72 Thus, the D.C. Circuit Court decision is not yet effective.

n72 Federal Rule of Appellate Procedure 41 (b).

[*331]

In addition, the D.C. Circuit clearly did not vacate the *UNE Remand Order*, which remains in full force and effect, Nor did the D.C. Circuit vacate § 51.317 of the FCC's rules, under which the FCC explicitly gives states the authority to further unbundle incumbent carriers' networks. Nor could the D.C. Circuit affect states' rights under the 1996 Act to impose unbundling obligations beyond those imposed by the FCC. Thus, even if the D.C. Circuit issues its mandate, this Commission retains full authority to proceed with this case, and to order Ameritech to unbundle its Project Pronto architecture, making it available to carriers seeking to line share.

The Impair Analysis

In undertaking an "impair" analysis of the Project Pronto UNE, the Commission must consider the following factors: cost, timeliness, quality of available alternatives, ubiquity, and operational factors. *UNE Remand Order,* PP 62-100.

Cost

Cost assessment includes considering costs associated with alternatives, including the forward-looking costs of self-provisioning or purchasing, and fixed and sunk costs involved in self-provisioning. *UNE Remand Order,* PP 72-88. The economic effect on CLECs is essential **[*332]** to determining whether CLECs will be impaired. SBC is investing six billion dollars in Project Pronto over three years. Covad Cross Ex. 23, at 2. Only an ILEC such as Ameritech would have the financial resources and cost savings to make such an investment in infrastructure. Covad Ex. 2, at 54-55. In essence, it is the ILEC's historical position as the monopoly provider that makes this investment possible. One available alternative for CLECs, if access to the Project Pronto architecture were denied, would be self-provisioning. However, carriers providing advanced services simply do not have the financial resources to pour six billion dollars into developing an advanced services network. n73 In fact, Ameritech witness Dr. Aron agreed that loops would pass the "impair" test in much of the country because a competitor could not make such a significant investment and reasonably expect to recover it. Tr. A-67 (Aron). It is for this reason that we unbundle Pronto.

n73 The FCC agreed with CLECs that "unbundled access to certain incumbents' network elements will accelerate initially competitors' development of alternative networks because it will allow them to acquire sufficient customers and the necessary market information to justify the construction of new facilities." (footnotes omitted). *UNE Remand Order*, P 112.

[*333]

Other offered alternatives are equally unviable. The record also included testimony about the cost of collocating DSLAMs at all of the remote terminals deployed by Ameritech in Indiana. We do not believe such collocation is a viable economic alternative for CLECs seeking to enter the market. Ameritech witness Dr. Aron presented a Sprint cost study that indicated that it cost Sprint $ 139,000 to collocate just one DSLAM at a remote terminal in Ameritech Territory. Ameritech Ex. 1, at 62. Based on this Ameritech-provided number, Covad witness Ms. Carter explained that, assuming Mr. Boyer's demand figures are correct, it would take Covad 94 years, assuming no customer chum, to recover the costs of such collocation in Indiana. Covad Ex. 2., at 13-16. This business case does not consider the CLECs' other costs, including the recurring and nonrecurring rates for the loop, the cost of DSL equipment in the central office, and the recurring costs to collocate in remote terminals. Indeed, based on this number, it would cost

nearly $ 100 million to collocate at all NGDLC Indiana RTs. We agree with Ms. Carter's conclusion that if CLECs were required to collocate a DSLAM at the remote terminal **[*334]** in order to compete, there would be no ubiquitous DSL competition since the expense would be too high to justify payback in a reasonable period of time.

On rebuttal, Ameritech's Mr. Boyer addressed Ms. Carter's use of the Sprint cost figures. Mr. Boyer claimed that it costs between $ 37,000 and $ 61,000 per remote terminal to establish remote terminal collocation. Even using these revised Ameritech numbers we conclude that it could take a CLEC fourteen years to recover the costs of remote terminal collocation. Again, this business case does not consider the CLEC's other costs, including recurring and nonrecurring loop rates, the cost of DSL equipment in the central office, and the recurring costs to collocate in remote terminals. Putting aside the contradictory nature of Ameritech's testimony on this subject, based on the number of RTs in Indiana, even assuming Ameritech's reply testimony is accurate, it would cost $ 50 million in Indiana alone to use RT collocation to obtain access to the same loop architecture which Ameritech Indiana can access.

We also note that the record illustrated that even if a CLEC installed a DSLAM, because Ameritech hardwired the backplane at the RT, CLECs **[*335]** would require use of an expensive ECS to get access from the copper sub-loop at the remote terminal. Ameritech has estimated such costs to be from $ 15,000 to $ 30,000 each. Covad Ex. 1, at 51. The only way to avoid ECS charges would be for a CLEC to install its own separate copper feeder cables from its field DSLAM location to each of the 3-5 subtending SAI locations, which would likely cost even more than an ECS. Covad Ex. 1, at 51. Other costs associated with remote terminal collocation of a standalone DSLAM are the costs associated with transporting traffic between the CLEC field DSLAM and the CLEC central office collocation space. *Id.*

In addition, there is no guarantee that the CLEC would be able to get its traffic from the RT to the Central Office absent placing new fiber and re-doing Ameritech's distribution plant. Ameritech itself is arguing to the FCC that dark fiber should be removed from the national UNE list. Replacing this fiber distribution plant would only add to the already prohibitively expensive costs of remote terminal collocation. We find it highly persuasive that no witness in this case could testify that remote terminal collocation was a viable business plan. **[*336]** In fact, given the costs of such collocation, on cross examination Dr. Aron, Ameritech's economist, made clear that she did not believe these costs supported sound business case. Tr. A.-51 ("I don't adopt this ... as a valid business case"). Indeed, no witness in this case testified that RT collocation was an economically sound business model. In fact, the only witnesses to comment on this question, Ms. Carter, testified that it is not.

We find that the costs of replicating Pronto are not the typical costs a new entrant faces in any industry (such as advertising costs). These are costs that only CLECs face in seeking to enter the local telecommunications markets. They are sunk costs in fiber and loop plant, an asset that cannot be moved from place to place to meet changing customer demand. The incumbents' existing and extensive local distribution network, existing customer base, and ownership of necessary rights of way, make this type of investment easy and economically sound for it. Covad Ex. 2, at 54-55. The enormous economies of scale and scope enjoyed by the ILECs, and the large sunk costs and substantial up-front investments needed to achieve that scale, make it obvious to us **[*337]** that CLECs are impaired without access to the Pronto loop architecture. Similarly, barriers to entry in the local telecommunications market -- such as securing rights of way and building access -- are far higher than in many other industries. *Id.* A CLEC seeking to serve a small number of customers would have to duplicate almost the entire loop plant of the ILEC, including trenching, poles, and wires, and could not take advantage of the economies of larger cable size. We agree with the FCC that "as a practical matter, building loop plant continues to be prohibitively expensive," especially because the loop cannot be relocated to serve a different customer. *UNE Remand Order* PP 77-78, 183.

Accordingly, we find that the cost disadvantages faced by CLECs are not typical of new entrants in other common industries. Because it is characterized by very large-scale economies, combined with high fixed and sunk costs, the existing telephone network necessarily was constructed with substantial regulatory assistance and guaranteed rates of return. The transmission grid that Pronto encompasses is extremely costly, including poles, cabling, conduit, and the price of rights-of-way. When the **[*338]** ILECs built that grid, they did so with the assurance of returns sufficient to cover their costs. They were also often provided access to right-of-way though eminent domain power. CLECs in today's market today have none of these advantages. We find that Project Pronto is simply the natural extension of the ILEC's bottleneck loop plant.

For the same reasons discussed above, we also, find that the costs of remote terminal collocation -- which can amount to a complete replacement of the incumbent's feeder plant -- are not typical costs facing new entrants in any industry. The incumbents' existing and extensive local distribution network, existing customer base, and ownership of necessary rights of way, make this type of investment feasible and economically sound only for the ILEC. Covad Ex. 2,

at 54-55. Because of Ameritech's historic monopoly position, Pronto will provide it recurring costs savings. To the CLEC, however, replicating Pronto, or conducting remote terminal collocation, is a sunk cost. It is important to remember that the savings attributed to Pronto result largely from the fact that it would remove the necessity of Ameritech sending a technician to provide customer service. **[*339]** However, CLECs placing DSLAMs in remote terminals, would be forced -- by lack of access to Pronto -- to send a technician to the remote terminal each time it provisions service to a customer.

Even if a small percentage of SBC's vast resources were available to CLECs, they do not have the same expansive network in place as Ameritech and therefore do not have the ability to deploy their networks and services quickly and ubiquitously. The only reason that SBC can deploy loop facilities designed to bring DSL capability to at least 80% of the customers in its 13-state region for $ 6 billion is that the company already has in place ubiquitous distribution plant, supporting structure, such as poles and conduit, and numerous other facilities, including upgradeable Digital Loop Carrier RTs which were built to provide narrowband telecommunications services to its monopoly basic exchange customers. We find that these are not the ordinary costs of new entrants in other sectors of the economy. These are the type of costs that only entrants seeking to break a bottleneck monopoly will face. We find, therefore, that it would be inefficient, and contrary to the goals of the 1996 Act, to require a **[*340]** competitor to replicate this network to compete against Ameritech.

Timeliness

We further find that beyond the sheer cost of building comparable facilities to offer advanced services, the substantial delays involved in a massive self-provisioning effort would preclude CLECs' ability to compete effectively. The record shows that Ameritech is able to upgrade its existing remote terminals to be "DSL-capable" within 6-8 months or less. Covad Ex. 2, at 56. On the other hand, it would take a CLEC years to be able to provide the same service using Ameritech's remote terminal proposal. For example, SBC has told CLECs it would take up to a year for an ILEC to negotiate for a right-of-way to the remote terminal. *Id.* This would likely take much longer for a CLEC without a long-standing community relationship. In fact, there is no assurance that a CLEC would get the necessary rights of way. This type of timeline clearly harms CLECs in getting to the market to provide advanced services and demonstrates impairment. In sum, without unbundling Project Pronto, we find that CLECs clearly are impaired from a timing perspective.

Ubiquity

The FCC's impair analysis includes ubiquity as a factor **[*341]** when state commissions determine whether a CLEC is impaired without access to UNEs. Specifically, the FCC directed that state commissions should consider the extent to which a competitive carrier can provide ubiquitous service using alternative facilities. Specifically the ability to provide service may be impaired where lack of access to a UNE "materially restricts the number or geographic scope of the customers" a competitive carrier can serve. *UNE Remand Order, P* 97. We find that without access to Project Pronto, data CLECs cannot provide ubiquitous xDSL services; and the inability to use the Project Pronto platform "materially restricts the number or geographic scope of the customers" a CLEC can serve.

We agree with Covad witness Ms. Carter. It is essentially impossible for any CLEC to approach the magnitude of Ameritech's reach in terms of cost and geographic scope. Covad. Ex. 2, at 57. This is especially true if a CLEC is seeking to replicate Ameritech's Pronto network.

The existence of home run copper does not alleviate these problems. The provisioning of xDSL over home run copper is distance sensitive, and generally cannot be supported on copper loops over 18,000 feet. **[*342]** Project Pronto extends the reach of xDSL by connecting copper subloops of no more than 12,000 feet (from the RT to the customer premises) to fiber subloops between the central office and the RT. Project Pronto is being deployed in large part to extend the reach of line-shared DSL beyond 18,000 feet of total loop length, and 18,000 feet is the maximum all-copper loop length on which line sharing can be achieved. Covad Ex. 1, at 31-33, 38-39. By deploying Pronto, Ameritech will increase the number of customers who can receive DSL service from 40% to 80%. Covad Ex. 1, at 32. Thus, even if spare copper loops were available beyond 18,000 feet, this would not make these customers available to carriers seeking to line share or purchase stand-alone loops to provide DSL services.

Ubiquity is further implicated by taking into the account the costs of collocating a DSLAM at a RT. As demonstrated above, given the large sums of money and time to complete the projects, CLECs will not be able to ubiquitously provide xDSL service using such arrangements. No witness in this case could testify that remote terminal collocation was an economic solution for a carrier seeking to offer services ubiquitously **[*343]** to Indiana consumers.

Operational and Technical Factors

The FCC concluded that "material operational or technical differences in functionality that arise from the use of alternative technologies may also impair a requesting carrier's ability to provide its desired services." *UNE Remand Order*, P 99. The evidence in this case amply demonstrates that unbundling Project Pronto is technically feasible. In fact, Ameritech ordered its employees charged with developing UNEs to "roll out a product offering to the CLEC community that could be offered over the architecture." Letter from Paul K. Mancini, SBC Vice-President and Assistant General Counsel, to Lawrence Strickling, Common Carrier Bureau Chief, February 18, 1999. n74 When SBC first asked the FCC for a waiver from its Merger Conditions that would allow SBC to own the OCD and the line cards in the NGDLC, SBC provided a sample appendix to be added to CLEC interconnection agreements that offered Project Pronto as UNEs. *Id.* Moreover, SBC has also acknowledged its obligation to unbundle its Project Pronto architecture. Covad Cross Ex. 27, at 3, 21; Covad Ex 29 at 4. It was only in April 2000 that Ameritech relabeled the Project **[*344]** Pronto offering from UNEs to an end-to-end service offering after SBC suddenly decided to change the name of Project Pronto from UNEs to a service while Mr. Boyer, SBC's project manager for Project Pronto, was on vacation. Tr. D-130-134 (Boyer). Regardless of the name, the evidence in this case demonstrates that it is technically feasible for Ameritech to provide the network elements of Project Pronto as an UNE.

n74 We take administrative of this letter, located on the FCC website.

After careful consideration of all these factors, we find that denying CLECs access to the Project Pronto network elements will impair CLECs' ability to provide competitive services.

Broadband Service Offering

Ameritech argues that its Broadband Service offering is a viable alternative to unbundling Pronto. We disagree. Ameritech's Broadband Service offering is a result of certain FCC merger conditions, which expired late last year. SBC retains the right to revoke, change or modify the terms, conditions, and rates of that offering. **[*345]** Ameritech has made no commitment as to how long, or on what terms or rates, it would continue to provide this offering once its merger conditions lapse. CLECs cannot build a business plan on a service that Ameritech can unilaterally withdraw within the next year. Indeed, if an ILEC's "voluntary" offering of an element at non-TELRIC rates satisfies the Act's impair standard, then the standard would always be met. As Dr. Aron admitted on cross-examination, a voluntary offering of a UNE at non-TELRIC rates is not an appropriate basis for satisfying the impair test. Tr. A-26-27 (Aron).

In addition, the Broadband Service Offering is not a UNE, it is the offering of a resold DSL service. Such a resold service provides little opportunity for a CLEC to differentiate its service from the retail Internet product offered by the Ameritech affiliate. First, the Broadband Service does not provide the same level of technical features and functions that Project Pronto UNEs would. Second, Ameritech's Broadband Service is limited to ADSL only, whereas CLECs, including Covad, currently offer other types of xDSL. Third, the resale "options" do not provide CLECs the ability to offer the full range of line-shared **[*346]** xDSL capabilities, such as voice or video over xDSL, to Indiana consumers. Fourth, if forced to resell Ameritech's Broadband Service, CLECs will be limited to features and functions that Ameritech chooses to offer. Covad witness Ms. Carter described some of the innovative services CLECs wish to offer over the Pronto architecture. Covad Ex. 2, at 31-32.

The FCC has held that the availability of resold services cannot be grounds under the impair standard to deny a CLEC from obtaining unbundled access. *UNE Remand Order*, P 67. As the FCC explained: "Allowing incumbent LECs to deny access to unbundled elements solely, or primarily, on the grounds that an element is equivalent to a service available at resale would lead to impractical results: incumbent LECs could completely avoid section 251(c)(3)'s unbundling obligations by offering unbundled elements to end users as retail services." At footnote 125 of the *UNE Remand Order* the FCC clarified that: "Simply because these capabilities can be labeled as 'services' does not convince us that they were not intended to be unbundled as network elements." We agree, and find that the offering of this service at resale does not change the **[*347]** conclusion that CLECs are impaired without access to Pronto as a UNE.

We also note that by offering Project Pronto as a service, rather than a UNE, Ameritech can effectively deny CLECs benefits and protections granted under § § 251 and 252. Duty to negotiate in good faith and TELRIC pricing are just two examples. *47 U.S.C. § 252*(d), 252(e)(6). Yet these provisions guarantee to CLECs the Commission's

assistance in establishing and enforcing non-discriminatory just and reasonable rates, terms and conditions for UNEs and interconnection access.

Unbundling Project Pronto is Consistent with the Pro-Competitive Goals of TA 96.

The Commission has the authority and a complete record in this proceeding to order Ameritech to unbundle Project Pronto. And we have already concluded that such unbundling satisfies the "impair" standard of the Act. However, we reiterate that we are also authorized to unbundle Project Pronto under an analysis pursuant to 47 C.F.R. § 51.317(b)(3). Given the evidence in this record, we conclude that unbundling of Project Pronto is consistent with TA 96, and therefore, required. We address each factor in 47 C.F.R. 51.317(b)(3) **[*348]** below.

Rapid Introduction of Competition in All Markets

We find that the unbundling of Project Pronto will accelerate the rapid introduction of competition for many xDSL services in all markets in Indiana. Covad Ex. 2, at 58. Without access to Project Pronto, data CLECs cannot provide ubiquitous xDSL services. Lacking the ability to provide ubiquitous services, CLECs will not be able to compete with Ameritech. Competition will certainly diminish and ultimately cripple customer choice in the advanced services marketplace. While Ameritech may perceive a market advantage in restricting CLECs' offerings to the same speeds, features and functions that Ameritech elects to offer, such an outcome is not consistent with the 1996 Act, Unbundling Project Pronto will allow CLECs to develop and deploy various types of xDSL, as well as voice and video over xDSL. Failure to unbundle, will result in the status quo: various speeds of one type of DSL technology without the capability to support new features such as voice and video over DSL.

Promotion of Facilities-Based Competition, Investment, and Innovation

Facilities-based competition takes time. To that end, the FCC agreed with CLECs **[*349]** that unbundling will initially "accelerate competitors' development of alternative networks because it will allow them to acquire sufficient customers and the necessary market information to justify the construction of new facilities." *UNE Remand Order*, P 113 (footnotes omitted). Further, in its *Line Sharing Order*, the FCC found that CLECs "have premised innovative marketing arrangements upon the presence of a line sharing requirement" which promotes innovation. *Line Sharing Order*, P 52. Ameritech wants to slow that potential by limiting what CLECs may access and thereby what they may offer in the marketplace.

We believe that by accessing the Pronto architecture on an unbundled basis, CLECs will continue to gain access to the loops that are a necessary input for their own facilities-based DSL services. Furthermore, the ability to use any technically feasible QoS and CoS, as well as the ability to use any line card that is technically compatible with the equipment, will ensure that innovation in the market continues.

In fact, the Supreme Court has recently recognized the fact that unbundling promotes facilities-based competition. In *Verizon v. FCC, 122 S. Ct. at 1669,* **[*350]** the Supreme Court concluded unequivocally that the "basic assumption of the incumbents' no-stimulation argument is contrary to fact." Based on the entire record before it, the Court rejected the ILEC argument that unbundling deterred investment:

> Nor, for that matter, does the evidence support [the] assertion that TELRIC will stifle incumbents' incentive either to innovate or to invest in new elements. Incumbents have invested over $ 100 billion during the same period. The figure affirms the commonsense conclusion that so long as TELRIC brings about some competition, the incumbents will continue to have incentives to invest and to improve their services to hold on to their existing customer base.

We agree that competition, not regulation, determines whether the ILEC will have an incentive to invest or not. Covad Ex. 2, at 9. In fact, the record uncovered that ILECs had DSL technology for over a decade and chose not to deploy it because they did not want to erode their high-margin second-line data services. *Id.* Only when CLECs entered the market did the ILECs begin to deploy DSL and construct facilities to provide it. Without the unbundling of Project Pronto, we believe that **[*351]** consumers will be left with having only one choice in the market -- a monopoly provider. Covad Ex 2, at 59. In fact, the FCC itself has concluded that the "tremendous investment in DSL deployment" by the ILECs was "spurred" by the "availability of unbundled network elements and line sharing." n75

n75 *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, 15 F.C.C.R. 29013, P 185 (2000).*

Finally, we reject Dr. Aron's suggestion that under this regulatory regime ILECs do not have the opportunity to recoup investment. Dr. Aron appears to assume that we will not be able to properly determine the appropriate costs under the TELRIC pricing methodology. Such an assumption is without merit.

Reduced Regulation

Ameritech argued that unbundling will not reduce regulation because it will increase the list of UNEs. The number of unbundled UNEs to which Ameritech must provide access is irrelevant. To reduce the implementation **[*352]** of regulation, Ameritech must simply adhere to the FCC's decision that requires incumbents to offer loops and subloops generally and our decision that it provide access to the HFPL, in particular, as UNEs. Simply put, we believe that once Ameritech begins providing the UNEs as ordered by the Commission and the FCC, litigation and other regulatory proceedings will reduce substantially.

Certainty in the Marketplace

The FCC's analysis of the "certainty in the marketplace" focused on providing CLECs, and not Ameritech, certainty in the marketplace for purposes of obtaining the necessary financial capital or expansion. *UNE Remand Order*, P 115. n76 We find that unbundling Project Pronto is essential for CLECs to execute their business plans. For example, Ameritech can pull the Broadband Service Offering or change its terms unilaterally once its Merger Conditions sunset. Utilizing Project Pronto UNEs in conjunction with their own facilities, will permit CLECs to develop a customer base and their network as intended by the TA 96 and the FCC's and the Commission's rules. Because a larger number of customers can be served via Pronto, it is essential that CLECs be provided the certainty **[*353]** to be able to provide their services in competition with Ameritech. The unbundling of Project Pronto will help attain that goal.

n76 Upon adopting unbundling requirements, the FCC stated it "should typically provide the uniformity and predictability new entrants and fledgling competitors need to develop and implement national and regional business plans." UNE Remand Order, P 115.

Administrative Practicality

We believe unbundling Project Pronto would be administratively practical. *UNE Remand Order*, P 116. Ameritech suggests that unbundling Project Pronto is "novel" and "complex," which is the standard ILEC response when CLECs seek the features and capabilities they need to support innovative new services. Unbundling Project Pronto is neither novel nor technically infeasible. The fact that Ameritech is offering Pronto to CLECs as an end-to-end UNE pursuant to tariffs in Illinois and Wisconsin demonstrates that it is technically feasible to offer it as such.

For all of the reasons stated above, Ameritech's Project **[*354]** Pronto meets the FCC's "impair" standard and must be unbundled. Further, even if Project Pronto did not meet the FCC's "impair" standard, the Commission has full authority, and the record in this proceeding demonstrates, that Project Pronto should be unbundled under 47 C.F.R. § 51.317(b)(3) to support the goals of the 1996 Act and foster market entry by CLECs.

The FCC's Packet Switching Criteria Are Met.

Further, even if we found that the Project Pronto architecture deployed by Ameritech implicates the FCC's packet switching unbundling rules, the FCC's rules would require ILECs to unbundle Pronto. The FCC's packet switching rules provide for unbundling when the following conditions are satisfied:

1. The incumbent LEC has deployed digital loop carrier systems, including but not limited to, integrated digital loop carrier or universal digital loop carrier systems; or has deployed any other system in which fiber optic facilities replace copper facilities in the distribution section (e.g., end office to remote terminal, pedestal or environmentally controlled vault);

2. There are no spare copper loops capable of supporting the xDSL services the requesting carrier seeks to **[*355]** offer;

3. The incumbent LEC has not permitted a requesting carrier to deploy a Digital Subscriber Line Access Multiplexer at the remote terminal, pedestal or environmentally controlled vault or other interconnection point, nor has the requesting carrier obtained a virtual collocation arrangement at these subloop interconnection points as defined by § 51.319(b); and

4. The incumbent LEC has deployed packet switching capability for its own use. n77

n77 47 C.F.R. § 51.319(c)(5); *UNE Remand Order* P 313.

Based on our examination of the record evidence, contrary to Ameritech's assertions, we find these criteria have been satisfied when Ameritech deploys Project Pronto in Indiana. Even under the standards of the *UNE Remand Order*, the unbundling of Ameritech's "packet switching" components must be required in all circumstances where Ameritech has deployed DSL services over Project Pronto. This is exactly the determination reached by the Texas Arbitrator after reviewing a virtually identical fact pattern. n78

n78 Arbitration Award, *Petition of Covad Communication Co. and Rhythms Links, Inc. Against SWBT for Post-Interconnection Dispute Resolution and Arbitration Under the Telecommunications Act of 1996 Regarding Rates, Terms, and Conditions and Related Arrangements for Line Sharing*, Public Utility Commission of Texas, Docket Nos. 22168 & 22469, (July 13, 2001) (Texas Arbitration Award); at 75-80.

[*356]

Paragraph 313 of the *UNE Remand Order* simply provides no basis to deny CLECs access to Project Pronto UNEs. The first FCC criterion, namely, that an ILEC actually deploy a DLC system or introduce fiber into the distribution plant, is obviously met. There is no question that Ameritech is deploying NGDLC carriers throughout its network. Covad Ex. 2, at 47-48.

The second FCC prerequisite to the unbundling of "packet switching capability" is the lack of spare copper facilities that are "capable of supporting the xDSL services the requesting carrier seeks to offer" n79 and that permit the CLECs to offer "the same level of quality for advanced services" as that offered by the ILEC (or its data affiliate). *UNE Remand Order*, P 313. Ameritech argued that the second FCC prerequisite for requiring unbundled access to packet switching, (*i.e.*, that "no spare copper loops" are available) will not be met because all-copper loops will often be available to the CLECs. Ameritech is wrong. As noted above, Ameritech's "all-copper" loop alternative is neither ubiquitous nor permanent. Ameritech has acknowledged that the purpose of Project Pronto is to overcome loop length issues that result **[*357]** from the traditional copper loop network. With Project Pronto, loop lengths are shortened to 12,000 feet or less, which allows SBC to offer broadband xDSL services to 20 million additional customers. *See FCC Waiver Order,* P 4. In contrast, CLECs are permanently foreclosed from providing DSL services to these customers using Ameritech's all-copper loop alternative because of excessive loop lengths or other network conditions. Covad Ex. 2, at 48-49. Similarly, in new areas of growth where only Project Pronto is deployed, there is no guarantee that CLECs will be able to access "all-copper" loops. *Id.* Finally, there is no assurance that all-copper loops will be preserved and maintained indefinitely. In fact, Ameritech's Mr. Boyer would not make a commitment whatsoever in regard to how long Ameritech will keep its existing copper loops in place in areas where it has deployed the NGDLC architecture. Tr. B-113 - 118 (Boyer).

n79 *UNE Remand Order*, at Appendix C (citing current 47 C.F.R. § 51.317(c)(5)(ii)).

In addition, **[*358]** the mere availability of an all-copper loop -- instead of the upgraded loops that are available to Ameritech and its affiliate -- does not discharge Ameritech's unbundling obligations associated with its Project Pronto architecture. As noted above, the physical characteristics of spare copper will almost never enable a competitive LEC to

match the service capabilities that Ameritech (and its affiliate) are able to offer over its upgraded loop architecture. Thus, the mere availability of spare copper will not discharge Ameritech's unbundling obligation, because competitive LECs will not be able to use those facilities to "support[] xDSL services the requesting carrier seeks to offer," *i.e.*, at least the same services that the ILEC and its affiliate can make available to the same customer. *See* 47 C.F.R. § 51.317(c)(5)(ii).

The FCC's third criterion provides that an "incumbent will be relieved of [its] unbundling [packet switching] obligation only if it permits a requesting carrier to collocate its DSLAM in the incumbent's remote terminal, on the same terms and conditions that apply to its own DSLAM. *UNE Remand Order*, P 313; *see also* 47 C.F.R. § 51.317(c)(5)(iii). The **[*359]** FCC also notes that ILECs "may not unreasonably limit the deployment of alternative technologies when requesting carriers seek to collocate their own DSLAMs in the remote terminal." *UNE Remand Order*, P 313. The record evidence in this proceeding demonstrates that Ameritech cannot satisfy this criterion. The FCC has found that the ADLU card is "an indispensable component for providing ADSL service through the manufacturer's NGDLC system." *FCC Waiver Order*, P 14, and n.34. This third prong establishes that the CLEC must be allowed to collocate its DSLAM in the incumbent's remote terminal "on the same terms and conditions that apply to its own DSLAM." As the record establishes, Ameritech has elected not to collocate DSLAMs at its RTs, but instead has opted to install ADLU line cards, which provide DSLAM functionality, at the remote terminals. Since Ameritech has strenuously resisted allowing CLECs to collocate line cards at the RT, the FCC's third condition for unbundling packet switching is met.

In addition, we find that the record supports the fact that physical collocation of a standalone DSLAM at the RT is simply not viable in most situations. SBC itself concedes that there **[*360]** is little or no excess capacity in cabinets, which comprise the primary type of remote terminal currently deployed. Covad Ex. 1, 43. SBC has noted other substantial problems with physical collocation at a remote terminal, such as the possibilities that it would require a "village of RTs, which neighborhoods and governmental entities would not find acceptable," or the need to "create RTs the size of central offices." Covad Ex. 1, 43. Zoning and right-of-way issues could delay or prevent the installation of new entrants' facilities and increase their costs.

Finally, it is beyond doubt that Ameritech has met the fourth criterion, that it has deployed packet switching capability for its own use.

In conclusion, we find that if certain capabilities associated with Ameritech's Project Pronto architecture are considered subject to the FCC's rules regarding "packet switching," we still order the unbundling of these capabilities in all circumstances where Ameritech has deployed fiber-fed, DLC-equipped loops, pursuant to the criteria set forth in the Paragraph 313 of the *UNE Remand Order*.

The Existence of Intermodal Competition.

As we stated in our recent comments to the FCC (cited **[*361]** in the introductory paragraphs), the existence of intermodal competition for broadband services does not alter our conclusion that CLECs are impaired absent the ability to access Project Pronto as a UNE. It is important to remember that cable companies, satellite companies, and other communications providers do not have the obligation to unbundle their networks. This is because these companies, did not enjoy a government grant of monopoly and the ability to construct a ubiquitous nationwide network, reaching nearly every home and business in the country, all financed by captive ratepayers. Covad Ex. 2, at 5. Ameritech is regulated differently because it is different. In exchange for opening its markets to competitors, Ameritech will one day be rewarded with permission to enter the long distance market in Indiana. This is the bargain Ameritech struck with the 1996 Act, and neither Ameritech nor this Commission can change that.

Intermodal competition is not and should not be the sole factor in determining whether a carrier is impaired without access to a UNE loop. For example, the existence of wireless competition does not mean that UNE voice loops should not be available to competitors. **[*362]** We find that the existence of limited retail broadband competitors, without Covad and other data CLECs having access to those competitors' transmission facilities, does not alleviate the CLECs' impairment.

Cable is not a viable alternative for CLECs for several reasons. First, cable providers do not lease their plant to other carriers. In addition, no one could seriously argue that the cost of building a ubiquitous cable network is a viable manner to enter the broadband market. Covad Ex. 2, at 17-18. In addition, the cable plant is of a shared nature, as all users get basically the same Internet access. *Id.* DSL service, by contrast, runs over loops that are dedicated to each end user and thereby allows DSL providers to offer dramatically different network services. Cable modem service does not provide the kind of upstream bandwidth that small business users and home office users demand. *Id.* Fourth, cable is

much less suitable for transmitting voice services. Voice over DSL, on the other hand, is a service that travels over dedicated loops and can more efficiently handle this type of traffic. Fifth, cable modems are generally not available to business customers.

We believe **[*363]** that cable modem competition creates at best a duopoly that would not benefit the public. Considering a second competitor for the few retail consumers that are lucky enough to have a choice merely converts a monopoly into a limited duopoly, and this highly concentrated duopoly market allows each market participant to retain substantial market power to raise prices and restrict services. We believe that result would violate the most fundamental precepts of the 1996 Act and would prevent competition from breaking open such an oligarchic market.

For similar reasons we reject the notion that satellite or wireless providers offer CLECs a viable alternative. We note that even Ameritech's witnesses had to concede that this technology is still nascent and untested. We also believe that these technologies have not proven to be the answer for a carrier seeking to provide ubiquitous broadband services in competition with Ameritech. This is because of the vast capital outlay that would be required (but most likely unavailable in today's markets) and, secondly, the problems and costs associated with obtaining spectrum. Covad Ex. 2, at 18-19.

We believe that it is important to advance policies that **[*364]** advance competition within and between technologies. Ameritech's position -- that the existence of cable modem competition negates unbundling of Project Pronto -- would lead us to a duopoly of broadband providers: the ILEC and the cable companies. We certainly do not find that result in the public interest or consistent with the pro-competitive intent of the 1996 Act.

Prices for the End-to-End Project Pronto UNE Must Be Based on TELRIC.

Ameritech did not propose terms, conditions, and rates for the Project Pronto end-to-end UNE ordered here. However, as we have indicated earlier, Ameritech has been ordered to offer Project Pronto to CLECs as an end-to-end UNE in Illinois and Wisconsin. Therefore, we find that Ameritech should develop the terms, conditions, rates and charges for the Project Pronto end-to-end UNE here in 30 days. To the extent necessary to comply with our findings in Section XI of this Order, Ameritech should modify the Indiana rates and charges, rate elements, or other information set forth in the 13-state Broadband Service Stand-Alone Pricing Appendix attached to Accessible Letter CLECAM02-149, dated April 19, 2002 and should so indicate and explain in its **[*365]** filing. The CLECs and the OUCC should also identify and explain in their respective filings any proposed changes to the prices, rate elements, or other information presented: (1) in the pricing appendix attached to the aforementioned Accessible Letter or (2) in Ameritech's filing required 30 days after the date of this Order. The CLECs and OUCC may file responsive testimony within 30 days after the date of Ameritech's filing and Ameritech may file reply testimony on or before 15 days thereafter.

Availability of Future Features and Functionalities.

Ameritech shall develop a Special Request Process for functions or features that are commercially available at the time the telecommunications carrier request is made. Ameritech shall collaborate with the other carriers to ensure that additional features and functions that are technically feasible are introduced and that other functionalities or functions may be requested by the Special Request Process.

Issues and Concerns Related to Project Pronto Business Processes and OSS Should Be Raised in Cause No. 41657.

To the extent that the parties believe there is a need to raise issues or concerns regarding the applicable business **[*366]** processes or OSS for Project Pronto, they should do so in Cause No. 41657. The Commission will establish a procedural schedule for these filings or collaboratives in that docket.

XII. 911 EMERGENCY SERVICES ACCESS

A. Ameritech Indiana's Testimony. Emergency Service Access ("ESA") provides the ability for facilities-based CLECs to manage and administer their records stored in Ameritech's 911 database. Also, ESA provides a monthly CD-ROM to a facilities-based CLEC containing the Master Street Address Guide ("MSAG") and the Access Routing File ("ARF"). The MSAG information is used to verify end-user customer address data, while the ARF information is used to determine a CLEC's trunk requirements. Am. Ind. Ex. 21 (Currie Supplemental Direct) at 5.

Ameritech Indiana filed its cost study for ESA on March 14, 2002; it provides the TELRICs for ANI/ALI/SR and database management associated with E-911. In its study, Ameritech Indiana proposes two recurring rates -- a Database

Management per 100 records charge and an Access Routing file charge. The Database Management per 100 records charge is for providing CLECs the ability to manage and administer their 911 Database records stored **[*367]** in Ameritech's database. The Access Routing file charge is the charge for the production and delivery of a CD-ROM containing the MSAG and the ARF to facilities-based CLECs. Am. Ind. Ex. 27 (Silver Supplemental Direct) at 1-2. These rates can be found on Silver Confidential Attachment MDS-5.

Ameritech Indiana's proposed rates are based on the TELRIC costs supported by Ameritech Indiana witness Dr. Currie. Am. Ind. Ex. 21 (Cume Supplemental Direct) at 6. In accordance with the Commission's Order striking Ameritech's direct testimony relating to shared and common costs, Mr. Silver applied the common cost allocator previously used in this subdocket (Phase 1) to the TELRIC costs to arrive at the resulting prices. Am. Ind. Ex. 21 (Silver Supplemental Direct) at 2.

B. CLECs' Testimony. The CLECs did not submit any testimony regarding Ameritech Indiana's ESA cost study.

C. Findings. Based on the evidence before us, we find that Ameritech Indiana's proposed cost study for Emergency Service Access ("ESA") is reasonable. We therefore approve the rates proposed by Ameritech Indiana for Database Management per 100 records charge and Access Routing file charge, as consistent with the TELRIC **[*368]** cost methodology required by the FCC. However, Ameritech also charges this service to other ILECs where Ameritech has the database and provides the E911 services to the PSAPs. If the TELRIC rate proposed by Ameritech here is higher than the rate charged to other ILECs, Ameritech must provide additional information in 30 days as to why it is higher and the Commission will decide at a later time the appropriate rate. The CLECs and the OUCC may comment within 30 days thereafter and Ameritech has an additional 15 days for any reply.

XIII. DARK FIBER

A. Ameritech Indiana's Testimony. The dark fiber prices proposed by Ameritech Indiana are based on TELRIC cost studies. Am Ind. Ex. 26 (Silver Direct) at 8, Att. MDS-2. Dr. Currie explained how Ameritech Indiana determined its TELRICs for dark fiber service orders. Dark fiber service order offerings include the dark fiber query request and the firm order request. A query request is handled by the local service center ("LSC") work group, which inquires about the availability of either interoffice dark fiber or loop/sub-loop dark fiber. Am. Ind. Ex. 20 (Currie Direct) at 15. The LSC's tasks include receiving the service order request, **[*369]** reviewing the request for accuracy and completeness, determining the appropriate loop or interoffice facilities capacity planner to contact, sending an e-mail to the planner to determine fiber availability, reviewing or following up on the planner's response, issuing orders in order to bill for the request, and confirming with the customer the availability of requested dark fiber. *Id.*

A firm order request is also handled by the LSC and provides either interoffice dark fiber or loop/sub-loop dark fiber. *Id.* Dr. Currie testified that the LSC undertakes the same activities for a dark fiber firm order request that are undertaken for a dark fiber query request. *Id.* at 16. In addition, the LSC verifies that the order flows to the Trunk Integrated Record Keeping System ("TIRKS"). *Id.* Further, a firm order request, unlike a query request, includes disconnect activities, which are the same for interoffice dark fiber and loop/sub-loop dark fiber. *Id.* The LSC disconnect tasks include receiving the disconnect request, reviewing the request for accuracy and completeness, issuing a disconnect order, verifying the order flowed to TIRKS, and sending confirmation to the customer. **[*370]** *Id.*

Ameritech Indiana witness Cass further explained Ameritech Indiana's dark fiber-related recurring and non-recurring TELRIC cost studies. He testified that Ameritech's non-recurring dark fiber cost study identifies the cost of the High Capacity Provisioning Center ("HPC"), Field Offices Group ("FOG"), High Capacity Control Center ("HCC"), Digital Operations Group ("DOG"), Construction, and Engineering work groups. Am. Ind. Ex. 18 (Cass Direct) at 4. According to Mr. Cass, the HPC designs the dark fiber facilities by selecting the specific facilities used to provision the dark fiber element. *Id.* The FOG group establishes and disconnects cross-connects in the central office. The DOG and Construction work groups place and disconnect the cross-connects in the field for the loop and subloop dark fiber elements. *Id.* The HCC coordinates circuit tests with the Construction work group; the Engineering work group provides inquiry information regarding the availability of dark fiber facilities for use by CLECs over a specific span of facilities and the Construction work group performs end-to-end testing on dark fiber loops, sub-loops, and interoffice circuits. Dark fiber service **[*371]** order costs, he claimed, are also nonrecurring costs incurred in provisioning dark fiber inquiries and firm orders. *Id.*

Mr. Cass explained that the recurring dark fiber cost study identifies the TELRIC recurring costs of dark fiber cable, optical splitters, fiber distribution frames ("FDFs"), and fiber optic jumper wires that are used to provision dark fiber to CLECs. *Id.* at 5. The fiber cable includes the cost of the cable made up of numerous fiber strands, placement of